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When Proportionality Equals Diversity: Asian Americans and Affirmative Action

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When Proportionality Equals Diversity: Asian Americans and Affirmative Action

Chan Hee Chu†

Abstract

In recent years, Asian Americans have become key players in the affirmative action debate. The current legal scholarship, however, has painted an overly simplistic picture of the impact of affirmative action on Asian Americans. Frank Wu, William C. Kidder, and other scholars have asserted that negative rather than affirmative action is the cause of any discrimination in school admissions against Asian Americans. Negative action, defined as the “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison,” denies Asian Americans admission to institutions of higher learning in favor of whites. Thus, while affirmative action treats race as a “plus factor” for beneficiaries, negative action treats race as a “minus factor” for Asian Americans.

In contrast, this Article argues that affirmative and negative action cannot be severed so easily because of their shared premise. Schools have implemented both policies based on the “Proportionate Ideal”—the belief that true equality of opportunity entails equality of outcomes. The Proportional Ideal provides justification for the use of statistical parity evidence that all race-based affirmative action programs inherently require. Problematically, programs using parity evidence have the de facto goal of proportionality. Moreover, since the Proportionate Ideal rejects exceptionalism of any group, the “overrepresentation” of admitted Asian American students has been portrayed as the byproduct of advantages rather than any conception of merit worth rewarding. In this way, the Proportionate Ideal limits Asian American enrollment whether they are compared to underrepresented minorities or whites.

Since affirmative action and negative action are closely linked, scholars need to take better care when critically examining the impact of race-conscious admission policies on Asian Americans. Scholars have been too quick to criticize Asian American opposition to affirmative action and have also overlooked the potential harms of such policies, including the devaluation of the Asian American identity. Regardless of whether Asian

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Americans choose to support or reject affirmative action, the decision must be made only after a full and honest analysis. This Article seeks to provide more balance to the current debate.

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INTRODUCTION

In American history, racial relations have too often been represented in a black and white binary.¹ This narrow framework fails to fully capture the depth of racial discourse in American society. Hispanics, Asian Americans and other “in-between” groups are often entirely overlooked.

Perhaps nothing illustrates this historic problem more so than Justice John Marshall Harlan’s celebrated dissent in *Plessy v. Ferguson*.² Referred to as the “Bible” by Justice Thurgood Marshall, “Harlan’s dissent” has long symbolized the Constitution’s commitment to racial equality.³ Yet forgotten in popular lore was Harlan’s use of racist references to Chinese

1. See Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Disclosure on Affirmative Action*, 55 *Race and Representation: Affirmative Action* 155–56 (Summer 1996), University of California Press, available at <http://www.jstor.org/stable/3043744>.

2. 163 U.S. 537 (1896).

3. See Goodwin Liu, *The First Justice Harlan*, 96 *CALIF. L. REV.* 1383 (2008).

Americans to shape his argument. As Harlan wrote:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race [cannot].⁴

Professor Gabriel J. Chin concluded that this conveniently forgotten passage did not truly advocate for racial equality, but instead suggested “an early ‘underinclusiveness’ argument similar to that found in modern equal protection analysis.”⁵ Chin argues, “[T]he law was irrational because it burdened one despised minority but not another, and the one that was not burdened was even more worthy of segregation from Caucasians.”⁶ This forgotten passage exemplifies the failure to incorporate Asian Americans into discussions over race—even when they are directly impacted by the outcome.

In the last few decades, affirmative action has become one of the most contentious racial issues in America, especially in the context of higher education.⁷ In its infancy, affirmative action discussions largely excluded Asian Americans or assumed they shared the same interests with other minorities.⁸ In *Regents of the University of California v. Bakke*,⁹ the first Supreme Court affirmative action case, the Court differentiated Asian Americans from other minorities only once—in a footnote—stating that it was “curious” why Asian Americans were included in U.C. Davis medical school’s affirmative action program.¹⁰ Today, with the growth of the Asian American population, the increased representation at elite institutions, and the legislative reforms banning the use of race by public institutions in California and Michigan, many commentators have recognized the potential for Asian Americans to substantially impact the outcomes of the debate.¹¹

Recognizing this opportunity, many Asian American legal scholars

4. *Plessy*, 163 U.S. at 561.

5. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157 (1996).

6. *Id.*

7. See Emil Guillermo, *More than 160 Asian-American Groups File Briefs in Support of Affirmative Action*, NBC NEWS (Nov. 3, 2015), <http://www.nbcnews.com/news/asian-america/more-160-asian-american-groups-file-briefs-support-affirmative-action-n456666>.

8. Given their in-between status, Asian Americans may share interests with underrepresented minorities and white Americans simultaneously.

9. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that while quotas were unconstitutional, race could be considered to promote diversity) (plurality opinion).

10. *Id.* at 309 n.45 (“The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.”).

11. See Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621 (1997).

have published articles supporting affirmative action.¹² In doing so, they have distinguished affirmative action from “negative action,”¹³ defined as the “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison.”¹⁴ Essentially, negative action denies admission to Asian Americans who would be accepted if they were white. While affirmative action treats race as a “plus factor” for beneficiaries,¹⁵ negative action treats race as a “minus factor.”¹⁶ Negative rather than affirmative action has thus been alleged to be the main source of any limitation on Asian American enrollment.¹⁷ Portrayals of Asian Americans as special victims of affirmative action have thus been characterized as attempts to merely use Asian Americans to further white conservatives’ interests.¹⁸ The “model minority myth,” spread by the media and conservatives, particularly concerned University of California, Hastings College of the Law professor Frank Wu and other like-minded legal scholars.¹⁹ Given their apparent diligence, Asian students often figure as unfair targets of affirmative action because of their race.²⁰ Wu and other commentators find the myth not only to be an inaccurate representation of Asian Americans, but also a source of interracial hostility.²¹

12. See, e.g., Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action* 15 B.C. THIRD WORLD L.J. 225 (1995).

13. See Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996); Wu, *supra* note 12; Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 617–20 (2006); Adrian Liu, *Affirmative Action & Negative Action: How Jian Li’s Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391, 411 (2008); Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2408 (1999).

14. Kang, *supra* note 13, at 3.

15. Beneficiaries are usually limited to underrepresented minorities.

16. Kidder, *supra* note 13, at 605.

17. See Kang, *supra* note 13; Wu, *supra* note 12; Chang, *supra* note 13, at 1127; Kidder, *supra* note 13, at 617–20; Liu, *supra* note 13, at 411; Kim, *supra* note 13, at 2408.

18. See Wu, *supra* note 12, at 226; Daniel P. Tokaji, *The Club: Asian Americans and Affirmative Action*, 1-FALL NEXUS: J. OPINION 47, 64 (1996) (“We Asian Americans must not allow ourselves to be manipulated through backhanded compliments that perpetuate the ‘model minority’ myth, while degrading other people of color.”).

19. Wu, *supra* note 12, at 226 (“The model minority myth of Asian Americans has been used since the Sixties to denigrate other nonwhites.”).

20. Wu, *supra* note 12, at 238.

21. Wu, *supra* note 12, at 237; see also Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 157 (2014) (“This creates resentment and tension between minority groups, which may lead to violence and anger, and prevent minority groups from working together.”); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1264 (1993) (“In addition to hurting Asian Americans, the model minority myth works a dual harm by hurting other racial minorities and poor whites who are blamed for not being successful like Asian Americans.”); Chang, *supra* note 13, at 1127 (“Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students.”).

Reflective of this growing scholarship and media coverage,²² the Supreme Court has taken an increasing interest in the role of Asian Americans in the debate. In *Grutter v. Bollinger*, the Court considered the potential consequences of affirmative action on Asian Americans more extensively than it had in *Bakke*.²³ This trend continued in *Fisher v. University of Texas (Fisher I)* when Justice Samuel Alito raised several poignant issues specific to Asian Americans during oral arguments.²⁴ Moreover, sociological studies conducted post-*Grutter* will likely require courts to take greater account of Asian Americans in the debate. These studies provide empirical evidence of discrimination against Asian Americans under affirmative action policies.²⁵ Armed with such studies, many Asian Americans have more openly questioned affirmative action.²⁶

Unfortunately, current legal scholarship does not sufficiently address the actual ramifications of affirmative action on Asian Americans. Rather than objectively examining the effects of affirmative action, commentators have focused almost exclusively on preventing the use of the Asian American narrative to further conservative interests. The general lack of attention to Asian interests and concerns from “liberals” has further widened this gap in scholarship.²⁷ Given both the lack of literature and growing importance of Asian Americans to the debate, it is crucial that there be an open and honest discussion about affirmative action and its

22. Leading up to the oral arguments in *Fisher I*, the *New York Times*, for example, published a series of articles illustrating the growing conflict within the Asian American community over affirmative action. *The Opinion Pages, Room for Debate*, N.Y. TIMES, (Dec. 12, 2012), <http://www.nytimes.com/roomfordebate/2012/12/19/fears-of-an-asian-quota-in-the-ivy-league>.

23. *Grutter v. Bollinger*, 539 U.S. 306, 382 (2003) (“...while a number of Caucasian and Asian-American applicants with similar or lower scores were admitted.”). The Court, however, appeared to equate the experiences of Asian Americans with that of white Americans. Further, the Court only referenced Asian Americans in *Gratz v. Bollinger*, the companion case to *Grutter*, in footnotes conveying statistical information. 539 U.S. 244, 299 n.2–3 (2003).

24. Oral Argument of J. Alito, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2014) (“Well, in terms of diversity, how do you justify lumping together all Asian Americans? Do you think—do you have a critical mass of Filipino Americans?”), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf at 52.

25. See THOMAS J. ESPENSHADE & ALEXANDRIA W. RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE ADMISSION AND CAMPUS LIFE (Princeton University Press, 2009); Thomas J. Espenshade and C.Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86(2) SOCIAL SCIENCE QUARTERLY 293–305 (2005).

26. See Ethan Bronner, *Asian-Americans in the Argument*, N.Y. TIMES, Nov. 1, 2012 (“Polls show Asian-Americans divided fairly evenly on the use of affirmative action. But its opponents appear to be growing more vocal, and they have joined the debate in a bigger way than in the past.”), http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html?pagewanted=all&_r=0; see also Complaint, Students for Fair Admissions Inc. v. President and Fellows of Harvard Co., 2014 WL 6241935 (D. Mass. Nov. 17, 2014).

27. See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29, 36 (2000) (“... liberal accounts of affirmative action sometimes treat APAs as a kind of ‘racial pariah’ and simply exclude them from the debate... The very fact that the Left has too often left APAs out of the affirmative action debate makes it difficult to critique the Left’s claims with much specificity.”).

impact on the Asian American community.

In Part I, I argue that all race-based affirmative action programs inherently operate under what I call the “Proportionate Ideal,” the belief that true equality entails equalities in outcomes. In light of this premise, supporters of affirmative action have felt the need to explain the “overrepresentation” of Asian Americans at elite institutions. Ironically, these arguments parallel those used to justify negative action policies against Asian Americans. The parallels between affirmative and negative actions are a result of the underlying presumption of the Proportionate Ideal. Therefore, the two policies implemented by schools are much more closely linked than what most scholars have previously envisioned.

Part II examines how Asian Americans have been portrayed under the mistaken view that affirmative and negative action policies are mutually exclusive. Under this belief, scholars have strongly condemned Asian Americans who have critiqued affirmative action. Recognizing that affirmative and negative actions are closely linked, Part II also shows how Asian Americans might validly question race-based affirmative action policies. Part III then reviews some of the arguments advanced in support of affirmative action, including the need to provide greater representation for certain Asian subgroups. This Section concludes by emphasizing that the Asian American community must control its narrative, whether it chooses to support affirmative action or not. While the conversation might be uncomfortable and at times heated, “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race”²⁸

I. THE PROPORTIONATE IDEAL AND ITS IMPACT ON ASIAN AMERICANS

A. *Proportionate Ideal*

Statistical parity or “proportional representation” has always been a crucial component of race-based affirmative action programs. Statistical parity exists when there is “a close approximation or a balance between the baseline representation or applicant pool and the actual percentage or the applicant flow.”²⁹ Since the 1960s, the United States government and other entities have used evidence of “under-parity”³⁰ or underrepresentation to imply discrimination.³¹ Such statistical evidence has been prominently

28. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014).

29. Symposium, *Rethinking Racial Divides-Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 221 (1998).

30. Most commonly, a group is considered underrepresented if they are not as well represented at a school as they are in the general population.

31. Sharon S. Lee, *The De-Minorization of Asian Americans: A Historical Examination of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 148 (2008).

featured in the discussion of affirmative action over the years.³² Advocates of affirmative action, for example, have cited the severe underrepresentation of certain racial minorities to support their positions in every case to reach the Supreme Court.³³ Generally, in higher education, parity statistics have been measured by comparing population figures with the actual representation at schools.³⁴

In their literature, scholars have advanced several policy rationales for affirmative action: backward-looking, forward-looking, proportionate representation, and diversity.³⁵ None of these justifications is mutually exclusive from the others, but each presents a unique rationale for promoting affirmative action. The backward-looking rationale seeks to remedy the effects of historical discrimination.³⁶ The forward-looking rationale corrects for currently existing social inequalities in education and socioeconomic status.³⁷ The proportionate representation rationale expressly pursues statistical parity.³⁸ And the diversity rationale aims to increase the variety in representation for the betterment of all.³⁹

Despite the variety of rationales, all of these theories rely on the lack of parity to demonstrate the need for affirmative action. For both backward- and forward-looking rationales, it would be difficult to demonstrate the effects of historical discrimination or current inequality without referencing statistical parity. In support of the backward-looking rationale, for example, one could point to slavery, Jim Crow laws, and a number of other egregious forms of discrimination against African Americans. Even after acknowledging that discrimination has profoundly impacted the representation of African Americans in higher education, it would still be difficult to provide a tangible estimate of the effects without referencing the statistics.⁴⁰ Similarly, pointing out disparities in wealth, parental support, educational attainment and other examples of social inequalities among the various racial groups alone would not provide a

32. See, e.g., *Bollinger*, 539 U.S. at 336 (“... the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.”); *Schutte v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1680 (2014) (“At UCLA, for example, the proportion of Hispanic freshmen among those enrolled declined from 23 percent in 1995 to 17 percent in 2011, even though the proportion of Hispanic college-aged persons in California increased from 41 percent to 49 percent during that same period.”) (Sotomayor, J., dissenting).

33. See, e.g., *Bollinger*, 539 U.S. at 336; *Schutte*, 134 S. Ct. at 1680.

34. The use of population figures rather than other baseline measures may also be debatable. See Lee, *supra* note 31, at 141.

35. See Wu, *supra* note 12, at 263–65.

36. *Id.* at 263.

37. *Id.* at 264.

38. *Id.* at 264–65.

39. As discussed, the proportionate and diversity rationales often overlap.

40. The difficulty in providing proof beyond statistical disparity has been well documented in disparate impact analysis. Plaintiffs have often failed to prove discriminatory intent as required despite demonstrating disparate impact. See *Washington v. Davis*, 426 U.S. 229, 246 (1976).

baseline to work towards.⁴¹ Given this use of statistical parity, “overrepresented” groups have often been excluded from affirmative action programs despite otherwise qualifying under the backward- and forward-looking rationales.⁴² Absent direct evidence of discrimination, challenges from Asian Americans against discriminatory policies have failed.⁴³

Although no affirmative action program expressly advocates for proportional representation, in practice, the proportionate and diversity rationales have merged. After *Bakke* and *Grutter*, however, the diversity rationale is the only legally permissible justification for affirmative action in higher education.⁴⁴ In *Bakke*, the Supreme Court explicitly banned the use of quotas while rejecting the use of race for remedial purposes in admissions (backward-looking rationale).⁴⁵ Despite this holding, the Court held that diversity was a compelling state interest, and warranted the use of race as an admissions factor.⁴⁶ The Court, though, was careful to point out that “genuine diversity” constituting a compelling state interest was not solely based on race or ethnicity.⁴⁷ Justice Powell believed race-only policies hindered the attainment of true diversity.⁴⁸ As *Bakke* was a plurality decision, uncertainty still remained about what rationales were permissible in using race for admissions. Twenty-five years later, the Court affirmed in *Grutter* the reasoning in Powell’s plurality and made clear that only diversity could legally justify the use of race.⁴⁹ The Court denounced “racial balancing” or proportional representation as an end goal, but

41. A school could conceivably create a program employing a tie-breaker mechanism when an underrepresented minority student is being considered. Problematically, students are likely not being assessed in pairs but as members of a much larger body of applicants. Moreover, schools would still need to determine the desired number of targeted students as well as how many of them were being admitted through the tiebreaker policy.

42. See Lee, *supra* note 31, at 141 (“on its face, the 29 percent hardly would support any ready conclusion that there’s a pervasive discrimination against people of Asian ancestry. . .”).

43. See *id.*; see also *The model minority is losing patience*, THE ECONOMIST, (“The department said they needed a smoking gun.”), <http://www.economist.com/news/briefing/21669595-asian-americans-are-united-states-most-successful-minority-they-are-complaining-ever>.

44. Diversity may only be a compelling state interest in higher education. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 771, (2007) (“This interest was critically dependent upon features unique to higher education: ‘the expansive freedoms of speech and thought associated with the university environment,’ the ‘special niche in our constitutional tradition’ occupied by universities, and ‘[t]he freedom of a university to make its own judgments as to education[,] includ[ing] the selection of its student body.’”) (citing to *Grutter*, 539 U.S. at 329).

45. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (“Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”).

46. *Id.* at 311–12.

47. *Id.* at 315.

48. *Id.*

49. *Bollinger*, 539 U.S. at 325 (“More important, for the reasons set out below, today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

allowed institutions to have a “critical mass” in mind in meeting their diversity goals.⁵⁰ “Critical mass” was defined as “meaningful numbers” sufficient to “encourage underrepresented minority students to participate in the classroom and not feel isolated.”⁵¹ Despite generating “daily reports” “track[ing] the racial and ethnic composition of the class,” the University of Michigan director of admissions “stressed [. . .] that he did not admit any particular number or percentage of underrepresented minority students.”⁵²

Although the reasoning in *Grutter* suggests that race-based affirmative action programs do not have to rely on statistical parity, in practice, they do. As the Court noted, even though diversity can encompass a variety of qualities, most schools primarily focus on race, with the goal of raising their number of “underrepresented” minorities.⁵³ Although racial diversity could theoretically be promoted by generally increasing minority representation from their current figures,⁵⁴ schools inevitably need some tangible goal figure in mind. Indeed, without parity figures, school administrators will be unable to determine whether that school lacks sufficient racial diversity in the first place. Likewise, admissions officers will be unable to know when “critical mass” has been reached without a target number.⁵⁵ Given that schools cannot intuitively know when and the

50. *Id.* at 340.

51. *Id.* at 318.

52. *Id.*

53. Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, at *50 (D. Mass. Nov. 17, 2014) (“Dean Fitzsimmons stated that race is ‘only one factor in deciding whether a candidate is admitted, but that certain minority groups, particularly African Americans, are ‘highly sought after’ and that, ‘[s]tatistically, one could make the argument that it’s easier for certain minorities [to be admitted].’”); see Symposium, *supra* note 29, at 202–03.

54. See Symposium, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1051 n.84 (1996) (“Between 1978 and 1992, Boalt Hall consistently admitted between 23% and 27% of each class from minority groups, which one might suspect to trigger suspicion of a covert quota. But Boalt Hall’s policy was, in fact, challenged instead for its much more flagrant violation of *Bakke*. The Education Department found that the law school employed a practice of placing minority candidates into separate tracks, so that minority candidates competed only with members of their own groups (a seeming refinement of the U.C. Davis scheme, which lumped all minorities together)”; *Berkeley Halts Quotas*, N.Y. TIMES, Oct. 4, 1992, § 4, at 2. (“The Education Department’s investigation was instituted, according to press reports, after an Asian applicant received a letter essentially saying she was on the ‘Asian waiting list.’”); Symposium, *Diversity on Trial: Grutter v. Bollinger*, 8 TEX. HISP. J. L. & POL’Y 7, 12 (2002) (“As the judge said on several occasions, that policy cannot be distinguished from a straight-quota system. Every year, since the adoption of the policy, U of M has never failed to enroll less than ten to twelve percent underrepresented minorities in the class . . . Aside from LSAT scores and grade point averages, no other factor is nearly as close as the race factor . . . Race is an incredibly heavy factor.”).

55. Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 672 (1989) (“The claims of Asian ‘overrepresentation’ suggest that administrators have some ideal racial balance in mind, partially based on census figures and on the benchmark system, but not on the differential SAT test-taking rates between Asian Americans and Caucasians.”); Michael E. Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 67 (2002) (“But most institutions will have some objective for the matriculation of minority students, usually stated in terms of ‘critical mass.’ At this point, the line between a “critical mass” (which sounds a lot like a minimum) and a set-aside begins to blur.”).

extent to which a program is necessary, statistical evidence is necessary for affirmative action. In fact, in both *Grutter* and now *Fisher (I & II)*, schools admittedly relied on such statistics in implementing their programs.⁵⁶ These schools and most institutions employing race-based initiatives determine the scope of their coverage based on whether groups are “under” or “over” represented, illustrating the unavoidable need for some form of parity analysis.⁵⁷ As one former admissions officer noted, “[A]lthough colleges would never admit students based on ‘quotas,’ they fearlessly will ‘sculpt’ the class with race and gender percentages in mind.”⁵⁸

Despite its empirical nature, the use of statistical parity is based on a value judgment.⁵⁹ The legitimacy of parity evidence relies upon the premise that there in fact would be parity or equality in outcome, were it not for the historical effects of discrimination and actual equality of opportunity. The suggestion that there could be any other outcome under these circumstances is sometimes interpreted by some as racism.⁶⁰ While Americans believe in the ability of individuals to succeed, many readily denounce the possibility of exceptionalism of groups in the aggregate.⁶¹ Yet even Jerry Kang, the scholar who first coined the term “negative action,” recognizes that the “presumption” that there should or would be proportionate representation is “suspect.”⁶² Too many variables are at play to believe that there would be perfect equity absent discrimination. Some studies controversially suggest that certain Asian or immigrant

56. The University of Texas asserted that it had adopted its current policy in part because critical mass had not been reached for underrepresented minorities. The University supported its conclusion by pointing to the low percentage of underrepresented minorities. Further, the very use of the term “underrepresented” evinces the use of parity evidence. Brief for Respondents *Fisher v. University of Texas II*, 2015 WL 6467640, at *39 (Oct. 26, 2015).

57. See Symposium, *supra* note 29, at 202–03. See also Tsuang, *supra* note 55, at 669 (“The number of admittees is monitored throughout Brown’s admissions season to ensure that the relative proportions of identifiable groups, such as athletes, minorities, and alumni children, remain fairly constant from year to year. However, this type of admissions process fails to account for demographic changes. As a result, the use of benchmarks at Brown has a detrimental impact on Asians, the fastest growing applicant group.”).

58. Sara Harberson, *The Truth About ‘Holistic’ College Admissions*, L.A. TIMES, June 9, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html>.

59. Kang, *supra* note 13, at 15 (“First, the glib assertion that Asian Americans are ‘overrepresented’ at certain universities is less a description of empirical fact than a value judgment. It presumes that the percentage of Asian Americans at each university should reflect their percentage of the national population.”).

60. See Amy Chua & Jed Rubenfeld, *What Drives Success?*, N.Y. TIMES, Jan. 25, 2014 (“Merely stating the fact that certain groups do better than others — as measured by income, test scores and so on — is enough to provoke a firestorm in America today, and even charges of racism.”), http://www.nytimes.com/2014/01/26/opinion/sunday/what-drives-success.html?gwh=D510B38FE6601EBD064F3638F5B3837F&gwt=pay&assetType=opinion&_r=0.

61. See *id.*

62. See Kang, *supra* note 13, at 15–16 n.70 (“Indeed, if we must have a baseline, why should it not be calculated state-by-state? Universities might also establish a baseline as indicated by the racial make-up of the applicant pool.”).

communities, for various reasons, do work harder or emphasize certain academic markers of success.⁶³ Furthermore, the many factors at play often converge in unexpected ways. Surprisingly, the “success” of Asian Americans may partly be explained by discrimination itself. Given the stereotypes of Asians as successful students,⁶⁴ schools and society more generally may punish Asian Americans who fail to meet expectations. As a result, both individuals and the community in the aggregate may not only work harder to achieve academic success but may also be driven towards certain fields of study and occupations.⁶⁵ Nonetheless, due to this underlying premise, race-based affirmative action programs ultimately have the *de facto* goal of proportionate representation. Problematically, basing affirmative action programs on the Proportionate Ideal, as discussed later, has had the unintended effect of devaluing⁶⁶ Asian Americans in American society, which in turn has worked to constrain their representation in higher education.

The current lack of statistical parity at institutions does not support the conclusion that affirmative action programs are not based on the Proportionate Ideal. First, the lack of actual parity can be explained by the existence of competing goals at elite institutions. Prestige, in the form of attracting the most “qualified” students, is one such example.⁶⁷ No matter how fallible their conception of merit may be, no school has yet been willing to compromise their standards completely for the sake of racial parity.⁶⁸ Second, the indefinite duration of affirmative action programs reveals just how strongly diversity policies are tied to the Proportionate Ideal. Even with the adoption of affirmative action programs, racial parity is unlikely to be achieved at elite institutions within the 25 year deadline suggested by Justice Sandra Day O’Connor’s “sunset provision”—a reality

63. See *The Model Minority is Losing Patience*, THE ECONOMIST, Oct. 3, 2015, <http://www.economist.com/news/briefing/21669595-asian-americans-are-united-states-most-successful-minority-they-are-complaining-ever>; see also Max Ehrenfreund, Study Ties hard work to Asian Students’ higher grades. What’s Your Excuse?, WASH. POST, May 5, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/05/hard-work-really-is-the-reason-asian-kids-get-better-grades-study-finds/>.

64. Chang Hwan Kim and Arthur Sakamoto, *The Earnings of Less Educated Asian American Men: Educational Selectivity and the Model Minority Images*, 2 SOCIAL PROBLEMS 61 (May 2014).

65. Yu Xie & Kimberly Goyette, *Social Mobility and the Educational Choices of Asian Americans*, 32 SOCIAL SCIENCE RESEARCH, 467–98 (2003).

66. By devaluing, I mean that Asian American achievements are perceived as the result of advantages. Although many Asian Americans may have advantages over other applicants, many do not and are often disadvantaged, especially in comparison to white Americans.

67. Others may include competition for resources, for example, from alumni.

68. Albert Y. Muratsuchi, Comment, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90, 121 (1995) (“However, the experiences of the last 25 years seems to have left the majority of the faculty resigned to the current compromise between attracting the ‘best and the brightest’ and continuing the institution’s commitment to promote racial diversity in the legal profession.”).

recently acknowledged by the Justice herself.⁶⁹ Since the lack of parity itself provides the main support for race-based affirmative action, the failure to achieve parity will always serve as “evidence” of the necessity of such policies. Illustrative of this logical fallacy, Asian Americans were excluded from the UC system’s affirmative action programs only after they were deemed “overrepresented.”⁷⁰

B. Proportional Representation Effects on Asian Americans

Asian Americans face unique challenges when statistical parity evidence is used to implement affirmative action.⁷¹ Ironically, Asian Americans themselves contributed to the harms arising from the use of statistical parity as a measure of equality. In *Bakke*, for example, several Asian American organizations submitted briefs asserting that affirmative action was necessary given the underrepresentation of Asian Americans in certain professions.⁷² These arguments, taken to their logical conclusion, suggested that Asian Americans could be excluded from such programs if they eventually became sufficiently represented or overrepresented.⁷³ Unfortunately, schools have applied this reasoning against Asian Americans over the years. In the 1960s and the early 1970s, Asian Americans were originally included in many affirmative action programs.⁷⁴ But as Asian Americans became “overrepresented,” preferential treatment was deemed unnecessary.⁷⁵ Many further believed that Asian Americans did not experience any discrimination.⁷⁶ Simply put, Asian Americans were no longer considered “minorities.”⁷⁷

Aside from “over” parity, Asian Americans satisfy the various justifications for inclusion in affirmative action programs.⁷⁸ Under the

69. *Bollinger*, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). In fact, Justice O’Connor has recently backtracked on the sunset provision. See Peter Schmidt, *Sandra Day O’Connor Revisits and Revives Affirmative-Action Controversy*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 14, 2010, available at <http://chronicle.com/article/Sandra-Day-OConnor-Revisits/63523/>.

70. Lee, *supra* note 31, at 143.

71. *Id.*

72. *Id.* at 137.

73. *Id.* at 138.

74. *Id.* at 132. Asian Americans were included in the affirmative action program at issue in *Bakke*.

75. *Id.* at 142–43; see also Symposium, *supra* note 29, at 202–03 (“And in 1975, when there were little more than a thousand Asian Pacific American law students in the entire United States—out of more than 100,000 total—the faculty at Michigan Law School decided that there were enough Asian American law students at Michigan and that there were enough Asian American lawyers in the community. Therefore, they specifically decided not to include Asian Americans in the affirmative action program at Michigan.”); Lee, *supra* note 31, at 142–43.

76. *Id.* at 131; Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 65, 78 (1994).

77. See *id.*

78. Chew, *supra* note 76, at 79–82.

backward-looking rationale, Asian Americans have been victims of racial discrimination including lynching, race riots, and slavery.⁷⁹ Several Asian American groups were denied citizenship into the 1950s.⁸⁰ And relevant to the affirmative action debate, Asian Americans were often targeted specifically for their economic success. Chinese American laundries, for instance, were looted and burned in the 1800s while Japanese Americans were banned from purchasing land under the California Land Law of 1913.⁸¹ In recent years, Asian Americans have also often been victims of hate crimes. South Asian Americans especially have increasingly been targeted.⁸² Thus, in certain contexts, Asian Americans often experience more discrimination than other minorities.⁸³

Further, there are many struggling Asian Americans who fit within the forward-looking rationale. Many South Asian immigrants, for example, “live in dismal economic and social circumstances,” and exhibit extreme poverty and low education rates.⁸⁴ Given the substantial variation within Asian subgroups, even established subgroups have members needing assistance. Chinese immigrants, for example, include many individuals on either extreme of the socioeconomic and educational attainment figures.⁸⁵

The wide variety of experiences and cultures embodied amongst various Asian ethnic groups also casts doubt as to whether Asian Americans could not provide the type of “diversity” schools seek.⁸⁶ Asian American pan-ethnicity encompasses much more than narrowly defined ethnic and cultural diversity: research also indicates great divergence in

79. *Id.* at 9. Perhaps worth noting may be the discrimination in admissions itself.

80. *Id.* at 17.

81. Lee, *supra* note 31, at 151; Wu, *supra* note 12, at 234.

82. Obama acknowledges rising hate crimes against South Asian Americans, F. World, May 1, 2013, <http://www.firstpost.com/world/obama-acknowledges-rising-hate-crimes-against-south-asian-americans-743405.html>; see also Chew, *supra* note 76, at 20 (Philadelphia report further indicates “Asian Americans were more likely on a per capita basis to become victims of hate crimes than whites, African Americans, Latinos, or Jews”).

83. See *id.*; Jocelyn Eikenburg, Debunking “Model Asian” Myth: Five Ways Asian-Americans Still Face Discrimination, HIPPO Reads, <http://read.hipporeads.com/debunking-the-model-asian-myth-five-ways-asian-americans-still-face-discrimination/>.

84. Chew, *supra* note 76, at 28.

85. Symposium, *supra* note 29, at 215 (“Some groups, like Chinese Americans, have high rates of both college graduates and adults with less than a fifth grade education. We have enormous educational disparities.”).

86. Chew, *supra* note 76, at 25–26; K.G. Jan Pillai, *Affirmative Action: In Search of A National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 31 (1992) (“The insularity of ‘Asian Americans’ as a minority group is no better than that of ‘Hispanics.’ The term ‘Asian Americans’ encompasses people from over twenty nations, including China, Japan, Korea, the Philippines, Vietnam, Cambodia, and India. Persons of Chinese, Japanese, and Filipino ancestry account for about two-thirds of all Asian Americans. Each group has its own national identity with accompanying differences in language, culture, ethnicity, religious beliefs, and socioeconomic conditions. In addition to the vast diversity among Asian groups, there are numerous subgroups within each national group.”). Asian American panethnicity formed in part as a reaction to shared experiences of discrimination rather than cultural identity. See Yen Le Espiritu, *Asian American Panethnicity: Bridging Institutions and Identities*, 14 (Philadelphia Temple UP 1992).

terms of “health, social, psychological and academic problems.”⁸⁷

Despite experiencing discrimination, needing help and potentially providing great diversity, Asian Americans, as a result of apparent “overrepresentation,” have been excluded from most affirmative action programs.⁸⁸ Thus far, legal scholars examining the effects of “over-parity” have questioned only the negative inferences stemming from the removal of Asian Americans from affirmative action programs—most notably the view that Asian Americans do not face any discrimination.⁸⁹ But basing affirmative action programs on the Proportionate Ideal has also required advocates of diversity policies to explain just why Asian Americans are “overrepresented.” These explanations have devalued and disadvantaged Asian Americans, which arguably pose a much greater problem than simply being no longer included or “advantaged” by affirmative action programs.

1. The Model Minority Myth – A Conservative Explanation of Asian Overrepresentation

Critics of affirmative action argue that the overrepresentation of Asian Americans in admissions suggests that minorities do not need preferential treatment to achieve success. These skeptics allege that Asian Americans “succeed” without the aid of racial preferences, even in the face of discrimination and other social inequalities, because of their hard work and sacrifice. In other words, they portray Asian Americans as “model minorities.”⁹⁰

Many legal scholars have sharply criticized this outwardly positive “model minority myth.”⁹¹ They argue that the myth obfuscates reality by viewing Asian Americans as a monolithic group, and for creating interracial tension between Asians and other minorities.⁹² As critics of the myth point out, widespread perceptions of Asian Americans’ success are not wholly accurate. While Asian Americans in the aggregate perform well in admissions, many Asian subgroups perform poorly.⁹³ Asian Americans are often also underrepresented in the “real” world. Most notably, Asian Americans often lack leadership positions even in fields where they are well represented overall (described as the “Bamboo Ceiling”).⁹⁴

87. Chew, *supra* note 76, at 29.

88. See Symposium, *supra* note 29, at 202–03.

89. Lee, *supra* note 31, at 151.

90. *Id.* at 145.

91. See *e.g.*, Lee, *supra* note 31, at 145; Wu, *supra* note 12; Chew, *supra* note 76.

92. Lee, *supra* note 31, at 131, 135–36.

93. Prop 209 may have, in fact, negatively impacted certain Asian American subgroups. See Kidder, *supra* note 27, at 42–43 (“Between 1994 and 1996, thirteen Filipinos were enrolled at Boalt. In the three years since the ban on affirmative action, there have only been three Filipinos enrolled at Boalt (all in 1998). Some have referred to this as the phenomenon of being ‘zeroed out.’”).

94. Chew, *supra* note 76, at 64–66.

Furthermore, the statistics used to demonstrate Asian financial “success” are often misleading. Socioeconomic figures often fail to acknowledge that Asian American households generally have more contributors to family income than other groups.⁹⁵ Given the widespread adoption of the image of Asian success, non-Asians widely believe that Asian Americans are not discriminated against, a clearly erroneous belief.⁹⁶

Critics have been especially troubled by the myth’s potential to bring about interracial hostility.⁹⁷ Since the myth depicts Asian Americans as having overcome discrimination and other social inequalities through hard work and sacrifice, it necessarily draws attention to why other racial minorities have been unable to match such “success.” The myth thus serves as a not-too-subtle critique of underrepresented groups. When used to attack affirmative action, the myth essentially asks of other minorities, “If Asians could succeed, why couldn’t you?”⁹⁸ Because of this harsh comparison, other minorities may and have at times viewed Asian Americans negatively.⁹⁹ Further, other minorities sometimes do not perceive Asian Americans as “minorities” given their alleged success and incorporation into mainstream society. The myth can therefore act as a barrier to building coalitions between minority groups.¹⁰⁰

To dispel the myth and its negative effects, affirmative action supporters have not only denied its claims, but have also felt compelled to explain exactly why Asian Americans are “overrepresented” in higher education.¹⁰¹ Generally, these arguments have emphasized the higher socioeconomic status of many Asian Americans, the unique form of discrimination faced by African Americans, and have also scrutinized the standards of merit used in admissions processes.¹⁰² These explanations refute any attempt to use the “success” of Asian Americans to disparage the

95. Wu, *supra* note 12, at 245.

96. *Id.*; Chew, *supra* note 76, at 8; see also Harvey Gee, *Judicial Perspective and Mentorship at the Supreme Court: A Review Essay on in Chambers: Stories of Supreme Court Law Clerks and Their Justices*, Edited by Todd C. Peppers and Artemus Ward, 51 DUQ. L. REV. 217, 247 (2013) (“Specifically, Justice Thomas has asserted that because Asian Pacific Americans have substantially greater family incomes than whites, they have ‘transcended the ravages caused even by harsh legal and social discrimination.’ Justice Thomas has also stated that Asian Americans should not be the beneficiaries of affirmative action, because they are ‘overrepresented in key institutions.’ Justice Thomas’ sentiments were echoed by Justice Stevens, who spoke to a group of Chicago lawyers at a luncheon a few years ago and compared current affirmative action for African Americans to past affirmative action for Asian Americans. Justice Stevens noted that Asian Americans have made great progress in the past few decades, and opined that Asian Americans no longer need to be considered as beneficiaries of any racial preferences.”).

97. See Wu, *supra* note 12, at 243; Li, *supra* note 21, at 157; Chang, *supra* note 21, at 1264; Chang, *supra* note 13, at 1127.

98. Wu, *supra* note 12, at 237.

99. See Kevin Brown, *Perspective and Point of View on Affirmative Action*, 85 IND. L.J. 1303, 1311 (2010).

100. Lee, *supra* note 31, at 131, 136 n. 35.

101. See Wu, *supra* note 12, at 244–47.

102. *Id.*; Brown, *supra* 99, at 1311.

lack thereof of other minorities. Essentially, they illustrate the advantages that Asian Americans have had over other underrepresented minorities—especially African Americans.¹⁰³

In demonstrating the socioeconomic advantage Asian Americans have had in the aggregate (compared to African Americans), scholars have pointed to immigration policies and their effects on Asian immigration. By severely restricting Asian American immigration and setting high standards for entry, the United States allowed only the most qualified individuals to enter.¹⁰⁴ Many Asian immigrants were therefore already highly educated and relatively affluent, providing their children with significant advantages over African Americans and other underrepresented minorities.¹⁰⁵

Further, most scholars agree that the discrimination against Asian Americans in the United States pales in comparison to that experienced by African and Native Americans.¹⁰⁶ Given the enslavement of African Americans and the genocide of Native Americans, it is hard to dispute such conclusions. Although hard to quantify, most Americans rightly have a “gut” feeling that African Americans have suffered more discrimination when compared to other minorities.

While the previous two explanations provide examples of “advantages” that Asian Americans have had over African Americans, the questioning of merit standards seeks to undermine the very nature of how people define “success.” By asking whether “objective” measures of merit such as test scores and grades accurately reflect the true worth of applicants, critics challenge not only the measures used but also the very idea that “success” is defined by high representation based on such characteristics.

In questioning the prevailing standards of merit, critics have argued that test scores and grades alone do not constitute true merit. This claim serves dual purposes. First, it fends off arguments that more Asian Americans should be admitted given their high test scores and grades. Second, it also suggests that, in the current representation, Asian Americans are overvalued while underrepresented minorities are undervalued. These points are especially appealing given the premise of the Proportionate Ideal that underlies support for race-based affirmative action.

103. See Wu, *supra* note 12, at 245.

104. *Id.* at 244–45; Lee, *supra* note 31, at 131, 134. Nonetheless, there are many Asian immigrants and their descendants who have found “success” despite arriving in the United States with little more than the clothes on their backs. Dennis Saffran, *To make elite schools ‘fair’ city will punish poor Asians*, N.Y. POST, July 19, 2014 (“Asians in New York are overwhelmingly first- and second-generation; some three-quarters of the students at Stuyvesant are immigrants or the children of immigrants. They’re hardly affluent, notwithstanding de Blasio’s implication that families who get their kids into the specialized schools are “rich.”), <http://nypost.com/2014/07/19/why-nycs-push-to-change-school-admissions-will-punish-poor-asians/>.

105. Wu, *supra* note 12, at 244–45; Lee, *supra* note 31, at 131, 134.

106. See Wu, *supra* note 12, at 245.

The critiques themselves have often been fueled by the inequality in outcome itself.¹⁰⁷ Consistent with the Proportionate Ideal, critics thus believe that a true and accurate measure of merit would lead to statistical parity or close to it.

Problematically, criticizing merit criteria in this manner helps buttress the stereotype that Asian Americans only have test scores and grades to offer as applicants. By arguing that merit is not simply “test scores and grades,” there is an implication that Asian Americans (1) do not participate in extracurricular activities to the same extent as other groups; (2) lack interpersonal skills; or (3) inherently cannot provide diversity—beliefs that are not only inaccurate but often rooted in racism.¹⁰⁸ A recent study of UCLA undergraduate admissions, for example, found no correlation between race and “personal achievement,” a category covering non-academic qualities including leadership capabilities, musical ability and community service.¹⁰⁹ In fact, “academic achievement” was “the only strong predictor of personal-achievement scores.”¹¹⁰ “High achievers,” recognizing the value in being a “complete” applicant, likely work hard to present such an image to admissions officers.

At the very least, these explanations work to devalue Asian American success, albeit sometimes fairly when compared to underrepresented groups.¹¹¹ More problematic, however, has been the use of these very rationales against Asian Americans when they are compared to whites: adherence to the Proportionate Ideal also entails that white representation should approximate their population figures. Therefore, even when compared to whites rather than to other minorities, Asian Americans figure as having advantages, thereby further devaluing their achievements.

107. See Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, 11 ASIAN L.J. 318, 320–21 (2004) (“Nine white privilege points get handed out to the white student when she sits down to take the test. Nine points is the gap for white versus black students. It is slightly smaller for Latinos, and then slightly smaller again for Native American students. The LSAT discriminates against Asian Pacific Americans as well.”). Both the disparities in test scores as well as admissions are considered problematic.

108. Chew, *supra* note 76, at 40–41, 62, 79; Tsuang, *supra* note 55, at 664–65 (“Other studies of Asian American high school students, while not describing the specific extracurricular achievements of applicants to Harvard, Brown, and Berkeley, refute the stereotypical perception that Asians avoid extracurricular activities.”) (“Brown’s COMA discovered that Asian applicants received comparatively low personal ratings, but concluded that the ‘unjustified low ratings are due to the cultural biases and stereotypes which prevail in the admissions office. Such biases and stereotypes prevent admissions officers from appreciating and accurately evaluating the backgrounds and nuances of the Asian American cultural experience.”); Symposium, *supra* note 29, at 199 (“And what that means, particularly, is that a number of institutions have insisted that Asian American people—as well as other racial groups, but primarily Asian Americans—do not contribute to diversity at an institution.”).

109. Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, at *51 (D. Mass. Nov. 17, 2014). Academic achievement was defined “principally [as] high school grades, AP courses, and standardized test scores.”; *Id.*

110. *Id.* at *52.

111. Nonetheless, as noted previously, many Asian Americans come from disadvantaged backgrounds.

Unfortunately, these views can fuel racial tension with both whites and other minorities by promoting the stigma that Asians Americans, given their inherent advantages, are “succeeding” without deserving it.¹¹²

2. Negative Action Against Asian Americans

Many Asian American scholars who support affirmative action consider it to be mutually exclusive from negative action. Under their interpretation, white affirmative action treats race as a “plus factor” for beneficiaries, negative action separately treats race as a “minus factor” for Asian Americans.¹¹³ While Asian Americans may be excluded from affirmative action programs, they are explicitly discriminated against by negative action when competing with whites. Thus, negative rather than affirmative action has been alleged to be the main source of any limits in admissions for Asian Americans.¹¹⁴ Informed by this scholarship, affirmative action advocates in *Fisher (I & II)* asserted, “Negative action against Asian American (or other minority) applicants may be real, but it is a phenomenon unrelated to affirmative action.”¹¹⁵

Asian Americans certainly face obstacles in admissions beyond affirmative action, including legacy and athletic preferences.¹¹⁶ While one

112. See Brown, *supra* note 99, at 1311 (“African Americans encounter racial obstacles in their academic pursuits that white and Asian students do not. This is something that, as an African American, I am well aware of . . . Such a person also appears to be oblivious to the privilege she received by being white or Asian, a privilege that underrepresented minorities see operating everyday.”); Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America*, 160 (Oxford University Press 2003) (“ . . . and African-American groups complained that Asians, including many immigrants, displaced blacks in graduate education, in employment in the booming electronics and software industry, and in minority business set-aside contracts as well.”); Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, at *84 (D. Mass. Nov. 17, 2014) (“At one time, Harvard had too many Asian American student. It’s important to Harvard to have people who know what it means to work hard, make good friends, and go out at night.”); Kyle Spencer, *For Asians, School Tests Are Vital Steppingstones*, N.Y. TIMES, October 26, 2012, <http://www.nytimes.com/2012/10/27/education/a-grueling-admissions-test-highlights-a-racial-divide.html>.

113. Kidder, *supra* note 13, at 605; Frank H. Wu, *Are Asian Americans Now White*, 23 ASIAN AM. L.J. 201, 206 (2016).

114. See Kang, *supra* note 13; Kidder, *supra* note 13; Mari Matsuda, *We Will Not Be Used*, 1 ASIAN PAC. AM. L.J. 79, 81 (1993); see also *Affirmative Action Statements*, 5 MICH. J. GENDER & L. 205, 218–19 (1998) (“Law professors Gabriel Chin, Sumi Cho, Jerry Kang and Frank Wu have stressed that there is a difference between viewing race neutrally by not including it as a factor when considering a candidate’s admission (like socio-economic class, geographic background, and athletic ability, etc.), and using race as a negative factor in admissions decisions, i.e. creating admission ceilings for particular ethnic groups. Affirmative action for other minorities does not require negative action against APAs. Where the application of affirmative action programs results in negative action for APAs, APAs should oppose the specific negative action, not affirmative action for other minority groups.”).

115. Brief of the Asian American Legal Defense and Education Fund, et al. as Amici Curiae Supporting Respondents at 18, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

116. Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN’S L. REV. 171, 187 (2013) (“A 1990 review of Harvard admissions by the federal Office for Civil Rights, examining why Harvard was more likely to accept white students than Asian Americans with similar academic records, found that legacy status frequently determined an applicant’s fate.”);

would presume that athletes are chosen explicitly for their athletic abilities,¹¹⁷ legacy admissions by their very nature provide advantages to whites over Asian Americans.¹¹⁸ Even worse, schools such as Brown University and U.C. Berkeley have previously limited Asian enrollment to maintain white acceptance rates.¹¹⁹

Despite the continuing use of legacy admissions—and the advantages it provides white Americans over Asian Americans—it is unlikely that much of modern day negative action exists because of an explicit desire to maintain a racial hierarchy. Admissions officers and administrators are presumably not only strong proponents of racial diversity on their campuses, but are also unlikely to have any real animus towards any racial minorities. Many admissions officers are now also people of color, including Asian Americans.¹²⁰ Furthermore, it is crucial to recognize that individual officers and administrators only execute overarching admissions policies set by more senior officials. The consistency in racial breakdown of many schools over the years, despite the likely changes in admissions officers and other school specific adjustments, attests to the existence and strength of top-down admission policies.¹²¹ While schools have previously implemented admissions policies to protect white enrollment, their strong defense of diversity suggest current programs have different goals in mind.¹²² Discrimination against Asian Americans are thus more likely to be

John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROB. 491, 515–16 (1993); Mark Muro, *Class Privilege: Harvard and Other Elite Schools Favor Children of Alumni—and at Least One Young Alumnus Doesn't Like It*, BOSTON GLOBE, Sept. 18, 1991, at 43.

117. Nonetheless, many college sports such as squash and crew are traditionally dominated by wealthy white Americans.

118. See Sara Harberson, Op-Ed, *The Truth about 'Holistic' College Admissions*, L.A. TIMES, June 9, 2015, available at <http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> (“Asian Americans are rarely children of alumni at the Ivies. . .”).

119. Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 556 n. 49 (2009); Karen Kurotsuchi Inkelas, *Caught in the Middle: Understanding Asian Pacific American Perspectives on Affirmative Action Through Blumer's Group Position Theory*, 44 J. C. STUDENT DEV. 625, 626 (2003) (discussing disclosures by Berkeley College and Brown University admitting that during part of the 1980s their admissions standards were biased against Asians as a consequence of their efforts to maintain the share of seats given to white students at historically established levels).

120. See also Lilian M. Loh, Note, *Reaction to: Asian Americans and Affirmative Action: Why Affirming Affirmative Action Won't Hurt "The Model Minority"*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 139 (2013) (An Asian American author argued that “[w]hen there are substantial numbers of Asian Americans admitted through the regular admissions process, the goal of attaining such diversity is not furthered by admitting more Asian Americans through the affirmative action process.”).

121. Ivy league schools, for example, have consistently enrolled 17 percent Asian Americans over the years. Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, at *48–49 (D. Mass. Nov. 17, 2014). Despite implementing a top-down policy, individual admissions can influence the qualities they seek in Asian American applicants within their allotted share of seats.

122. Brief for Brown Univ. et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), 2012 WL 3527821 at *1–3.

an unintentional byproduct of admissions policies as a whole, rather than an explicit objective.

Jerry Kang himself¹²³ recognized that diversity programs under certain circumstances could directly lead to “a regime of negative action” against Asian Americans.¹²⁴ In fact, Kang’s piece addressing negative action was motivated by the concern of what he termed the “Internal Instability of Dworkin’s Defense of Affirmative Action”: tension among “traditional liberals [who] are comfortable with the idea of affirmative action, [but] are uncomfortable with the idea of negative action against Asian Americans.”¹²⁵ Kang further acknowledged that such policies are not necessarily driven by prejudice against Asian Americans. Instead, “[t]he assertion that any policy facially disadvantaging Asian Americans must have been corrupted by prejudice is true only by fiat.”¹²⁶ Further, Kang contended that negative action could conceivably provide benefits such as “allowing more space for less represented minorities” as well as “decreas[ing] prejudice by increasing the social intercourse among individuals of different races in an open-minded, intellectual community.”¹²⁷ Consistent with such views, schools have emphasized that diversity programs provide benefits by adding “rigor” and “depth” in the educational experience, fostering “citizens and leaders” who are better able to navigate diverse environments.¹²⁸

Given these goals, it seems unlikely that negative action policies were adopted with the objective of harming Asian Americans. Affirmative action supporters dispute this, but they are unpersuasive given the inconsistency of their claims. In *Fisher (I & II)*, after asserting that negative action is “entirely distinct” from affirmative action, these advocates stressed they “would vigorously oppose any form of negative action, formal or informal.”¹²⁹ Despite acknowledging the existence and problem posed by negative action, these groups have allied themselves with schools and administrators who practice such policies.¹³⁰ Apparently, schools and

123. Nonetheless, Kang seems to have sided with other scholars who do view affirmative and negative action as mutually exclusive. See Jack Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice*, 4 UCLA ASIAN PAC. AM. L. J. 129 (1996), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186242.

124. Kang, *supra* note 13, at 15.

125. Kang, *supra* note 13, at 4.

126. Kang, *supra* note 13, at 15.

127. *Id.*

128. Brief for Brown Univ. et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex.* at Austin, 2012 WL 3527821 at *2.

129. Brief for Asian Am. Legal Def. Fund et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex.* at Austin, 2012 WL 3308203 at *6.

130. The scholarship relied upon by these Asian American organizations recognizes that many selective universities do limit Asian enrollment. Rather than disputing the existence of discrimination, Wu, Kang authors have instead asserted that negative rather than affirmative action to be the cause. These scholars have criticized the clear existence of negative action at many top schools. See Kidder, *supra* note 13.

individuals practicing negative action can be trusted to implement a separate racially driven program faithfully without prejudice. This “unholy” alliance cannot be reconciled unless negative action is a natural byproduct of affirmative action.

While not intentionally prejudicial, school administrators implement negative action against Asian Americans because of their strong belief in the Proportionate Ideal. These administrators believe that underrepresented minorities would be better represented but for a history of discrimination and other existing social inequalities.¹³¹ This is true in many respects, but the belief in the Proportionate Ideal also creates the impression that Asian Americans must have some advantages given their “disproportionately” greater representation in higher education. No limiting factor precludes the conclusion that the advantages Asians have over other minorities cannot also be true when comparing Asians and whites.¹³²

Many of the arguments advanced to explain Asian Americans’ success and their exclusion from affirmative action programs in fact parallel the justifications for negative action. Negative action has been defended on grounds that Asian Americans have already attained socioeconomic success¹³³ and the inexact evaluation of “merit.”¹³⁴ Asian Americans, for instance, have often been portrayed as having higher income figures and educational attainment in comparison to both other minorities *and* whites.¹³⁵

131. The intuitive appeal of the Proportionate Ideal cannot be understated. *See* Wu, *supra* note 113, at 215 (“If you look at California law schools right after the passage of Prop. 209 in 1996, the numbers of some demographics have dropped to zero or one. I don’t have a highfalutin constitutional law theory as to why that’s wrong. There’s something wrong with that, and however you want to look at it, and I’m not saying we need proportionality or quotas or something like that. I’m saying that’s it’s not the same to have a society that looks as it does, and classrooms and meetings of deans and other important people that look as they do. Sooner or later, somebody is going to notice, and they’re going to say something, and it won’t be very nice. So, there, too, we have a choice of which side we stand on.”).

132. Even Frank Wu has previously recognized that there may be affirmative action programs that may naturally favor white Americans over Asian Americans without being discriminatory. As Wu posited, an affirmative action program based on the proportionality rationale must be applied “consistently.” Wu, *supra* note 12, at 281. Problematically, as this Article posits, race-based affirmative action programs inherently strive for proportionality.

133. The model minority myth has been discredited in part by arguments that Asian Americans are not quite as socioeconomically successful as portrayed. At the same time, however, Wu and others alleged that Asian Americans were in fact advantaged in comparison to underrepresented minorities because of immigration policies that only allowed affluent, well-educated Asians to enter the United States.

134. The argument that Asian Americans lack certain qualities such as interpersonal skills.

135. *The Rise of Asian Americans*, PEW RESEARCH: SOCIAL & DEMOCRATIC TRENDS, (updated ed. Apr. 4, 2013), available at <http://www.pewsocialtrends.org/2012/06/19/the-rise-of-asian-americans/> (“But despite often sizable subgroup differences, Asian Americans are distinctive as a whole, especially when compared with all U.S. adults, whom they exceed not just in the share with a college degree (49% vs. 28%), but also in median annual household income (\$66,000 versus \$49,800) and median household wealth (\$83,500 vs. \$68,529”). Frank Wu has reasoned that “positive” images of Asian Americans can often be flipped to stereotype that as “unfair competitors.” Wu, *supra* note 12, at 240–41. While that may certainly be true, denying the model minority myth in the manner he and like-minded

However, although “merit” should indeed encompass more than simply test scores and grades, a broader conception allows biases to creep into admissions decisions.¹³⁶ Since the same high-ranking administrators determine all admissions policies, including diversity programs, they have likely internalized the reasons for differentiating Asian Americans from underrepresented minorities—influencing their views on how to distinguish between Asian Americans and whites. Thus, these administrators likely have difficulty conceiving that Asian Americans may be advantaged in comparison to other minorities but not to whites. Dean Fitzsimmons, the dean of admissions at Harvard College, for instance, has at times “blamed the disparity in admissions” between Asian and white Americans on the former being “slightly less strong on extracurricular criteria”—a much-maligned theory.¹³⁷ Problematically, these individual biases have helped justify admissions policies that discriminate against Asian Americans. As Rod Bugarin, a former admissions officer at several selective schools,¹³⁸ admitted, “[I]f affirmative action is overthrown by the Supreme Court, our elite campuses will look like U.C.L.A. and Berkeley. That wouldn’t be good for Asians or for anyone else.”¹³⁹ These close-minded views highlight how the Proportionate Ideal works to limit Asian enrollment in race-conscious admissions.

C. The Case for Limited Exceptionalism

Given their belief in the Proportionate Ideal, supporters of affirmative action have *expressly* denied the model minority myth and other suggestions of Asian American exceptionalism.¹⁴⁰ Problematically, if Asian Americans are not exceptional in any respects, their “over-parity” cannot be based on any conception of merit worth rewarding. Taken to its logical conclusion, a complete rejection of exceptionalism implies that too many “undeserving” Asian Americans are being admitted, which would justify limiting their enrollment. Therefore, this Article calls for a recognition of limited exceptionalism: while the model minority and its negative uses against other minorities should be disavowed, the Asian American community should be able and willing to acknowledge the success of its members without diminishing their achievements as solely the byproduct of

commentators helps buttress such stereotypes. Wu’s denial of the myth may itself be casting Asian Americans as “unfair competitors” in school admissions.

136. See TIM GROSECLOSE, CHEATING: AN INSIDER’S REPORT ON THE USE OF RACE IN ADMISSIONS IN UCLA (Dog Ear Publishing 2014); see also Tsuang, *supra* note 55, at 678 (arguing that universities “should be required to articulate in [their] application materials the criteria, specifically the subjective considerations, which serve as the basis for admissions decisions.”).

137. Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, *36 (D. Mass. Nov. 17, 2014).

138. Wesleyan University, Brown University, Columbia University. See Bronner, *supra* note 26.

139. Bronner, *supra* note 26.

140. See *e.g.*, Lee, *supra* note 31, at 145; Wu, *supra* note 12; Chew, *supra* note 76.

alleged undeserved advantages.

The Proportionate Ideal makes it difficult to argue that a group, without advantages, can outperform their peers. Nonetheless, despite being comparatively *disadvantaged*, Asian Americans, in many respects, have outperformed white Americans independent of socioeconomic status or educational attainment.¹⁴¹ Despite the implementation of negative action policies, whatever its origin, Asian Americans are proportionally (compared to their national population levels) better represented at elite institutions than whites.¹⁴² Even the media's fascination with Asian American success is due in part to their outperformance of all other groups, including whites.¹⁴³ The Wall Street Journal even quipped that modern "white flight" involved whites fleeing neighborhoods dominated by Asian Americans out of fears they could not compete academically.¹⁴⁴ This reality undermines the very premise of the Proportionate Ideal and the use of statistical parity as the basis of affirmative action. Given the disadvantages Asian Americans face in comparison to whites, the Proportionate Ideal would suggest that Asian representation should be lower, rather than higher, than that of white Americans, absent programs designed to eradicate the effects of discrimination.

In response, some may argue that there are alternative explanations for the success of Asian Americans as compared to whites. They might point to the higher levels of educational attainment and socioeconomic status of Asian immigrants and other factors. But by doing so, they would be supporting one of the main contentions of this Article—that Asian American success can be traced to more than alleged advantages, or that negative action is justified. If Asians are in fact "advantaged," even in comparison to whites, then scholars should have no problem with negative action since such policies would only be working to provide true equality. Such critics would then necessarily have to support strict proportionality to compensate for any unfair "advantages" Asian Americans may have over whites.

Further, critics of the myth themselves have ironically and implicitly championed Asian American exceptionalism through their condemnation

141. Thomas R. Jimenez & Adam L. Horowitz, *When White Is Just Alright: How Immigrants Redefine Achievement and Reconfigure the Ethnoracial Hierarchy*, 78 AM. SOCIOLOGICAL R. 849 (2013), <http://asr.sagepub.com/content/78/5/849>; see also Kyle Spencer, *New Jersey School District Eases Pressure on Students, Baring an Ethnic Divide*, N.Y. TIMES, Dec. 25, 2015, available at <http://www.nytimes.com/2015/12/26/nyregion/reforms-to-ease-students-stress-divide-a-new-jersey-school-district.html>.

142. See Ron Unz, *The Myth of American Meritocracy*, THE AMERICAN CONSERVATIVE, (Nov. 28, 2012), at 24 & n.53, <http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/>.

143. See Nicholas Kristof, Opinion, *The Asian Advantage*, N.Y. TIMES (Oct. 10, 2015), available at <http://www.nytimes.com/2015/10/11/opinion/sunday/the-asian-advantage.html>.

144. Suein Hwang, *The New White Flight*, WALL ST. J. (Nov. 19, 2005), <http://online.wsj.com/news/articles/SB113236377590902105>.

of negative action. Even these critics admit that most, if not all, of the advantages Asian Americans have over underrepresented minorities are non-existent over white Americans.¹⁴⁵ Indeed, they recognize that Asian Americans face challenges and discrimination that hinder their abilities to compete with whites.¹⁴⁶ These scholars have adamantly supported affirmative action while criticizing negative action out of the belief that Asian Americans stand to benefit from a level playing field.¹⁴⁷

The manner in which scholars try to discredit this myth matters. While it is important to deny any attempt to use Asian Americans to criticize other minorities, we should recognize that many Asian Americans have in fact achieved a great deal, and avoid dismissing their success as solely the byproduct of advantages. As explained earlier, commentators currently have sought to debunk the myth by simply alleging that the “myth is false,” “that many Asian Americans are not doing well” and those “that are ‘succeeding’ are only doing so because they are privileged.”¹⁴⁸ These arguments are neither nuanced nor complete, and they are also harmful to the community. To counterbalance these portrayals, we should be mindful that there are many individuals who have, through their own hard work, carved out exemplary records of achievements—often in spite of many hardships and obstacles. The reluctance to acknowledge and give voice to this portion of our community’s narrative does a great disservice to many among us. Why should any other community, whether they be white or minority, recognize these individuals and their accomplishments when we fail to do so ourselves? In discussions over race and admissions, scholars need to more carefully consider a middle ground in the debate.

II. PROVIDING SPACE FOR THE ASIAN AMERICAN NARRATIVE

A. The Impact of the Current Portrayal of Affirmative Action and Negative Action

1. Backlash to Asian American Criticism of Affirmative Action

Given the unfounded contention that affirmative action and negative action are mutually exclusive, Asian American commentators have

145. See Chin et al., *supra* note 123, at 19–23.

146. See Chew, *supra* note 76, at 18–24; Kang, *supra* note 13, at 20 (“Conditions I and II hold, Asian Americans are asked to bear an even greater burden than Whites since, by definition, negative action involves rejecting individuals of Asian descent who would have been admitted had they been White.”); Wu, *supra* note 12, at 279 (“... it was for inclusion of whites to the exclusion of Asian Americans. Officials at the University of California campuses at Berkeley and Los Angeles indicated, respectively, ‘if we keep getting extremely well-prepared Asians, and we are, we may get to the point when whites will become an affirmative action group . . .’”).

147. See Kang *supra* note 13; Wu, *supra* note 12; Kidder, *supra* note 13.

148. Characterizations of the arguments advanced by Wu and other like-minded commentators. See Wu, *supra* note 12; Chin et al., *supra* note 123.

generally characterized any criticism of affirmative action within the community as sorely misguided. Scholars like Wu and Mari Matsuda have argued strongly against the portrayal of Asian Americans as victims of affirmative action.¹⁴⁹ The most problematic aspect of such scholarly works is their negative portrayal of Asian Americans who challenge race-based affirmative action programs. Matsuda, for example, “condemn[s] the voices from our own community that are translating legitimate anger at ceilings on Asian admissions into unthinking opposition to affirmative action floors needed to fight racism.”¹⁵⁰ This rebuke of Asian American critics of affirmative action is based on her belief that affirmative action and negative action are clearly separable policies. Matsuda further states,

When university administrators have secret quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we can’t let in all those Asian over-achievers AND maintain affirmative action for other minority groups. We can’t do both because that will mean either that our universities lose their predominantly white character, or that we have to fund more and better universities. To either of those prospects, I say, “why not?”¹⁵¹

Matsuda undoubtedly believes not only in the importance of affirmative action, but also that the ceiling or limit on Asian enrollment stems from negative rather than affirmative action.

As Matsuda and Wu have asserted, Asian American “success” should not be used against other minority groups. Asian American success, however, has in fact been used against other minorities throughout United States history.¹⁵² Even now, some conservatives have tried to portray Asian

149. Wu, *supra* note 12; Matsuda, *supra* note 114; Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 24 (1994) (“To the extent that Asian Americans accept the model minority myth, we are complicitous in the oppression of other racial minorities and poor whites.”); Conference, *Race Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 624 (1996) (“If Asian Americans think that affirmative action is the major impediment to their suddenly becoming, say, fifty percent of the entering freshman class at the University of California at Berkeley, or twenty percent of the class at Harvard, or twenty percent of the class here at American University, they’re in for an unpleasant surprise because if affirmative action is abolished, I’ll bet anyone here any amount of money they’d like to bet that Asian Americans will not suddenly assume the numbers you would think that they would assume under meritocratic standards because they would just overwhelm college campuses.”).

150. Matsuda, *supra* note 114, at 81; *see also*, Kenneth Lee, *Angry Yellow Men: Exploiting Asian Discontent*, THE NEW REPUBLIC, Sep. 9, 1996, at 11; Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823, 830 (2005) (“Instead of succumbing to this ‘divide and conquer’ strategy, NAPALC decided to side with the other minority groups in coalition, filing an amicus brief before the United States Supreme Court in support of the university.”); Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”*, 100 NW. U. L. REV. 331, 342 (2006) (“Asian Americans, in short, enabled affirmative action opponents to claim that the era of white privilege was over, and to make more attractive arguments against affirmative action couched in terms of equal treatment among minority groups, while steering clear of unpopular arguments regarding affirmative action’s purported unfairness to whites.”).

151. Matsuda, *supra* note 114, at 81.

152. Wu, *supra* note 12, at 231.

Americans as “innocent victims” in order to advance their own interests.¹⁵³ Yet the truth is likely more complex than Matsuda’s portrayal of discrimination simply being a function of racist whites.¹⁵⁴ Most admissions policies likely aim for the Proportionate Ideal, rather than operate with real animus against Asians. Thus, such strong rebukes of any disagreement with affirmative action are troubling. Even if renewed discussion unearths previously undisclosed problems with affirmative action, there still might be compelling reasons to uphold such policies. The public, however, must be allowed to reach such a conclusion through an open and honest debate. By so harshly castigating any Asian Americans who dare question affirmative action by essentially calling them “Uncle Tams,”¹⁵⁵ these scholars stifle a more nuanced discussion to the detriment of our community and also society at large.¹⁵⁶

Asian American critics of affirmative action have been belittled unfairly due to their opinions. For example, in 2012, state senator Edward Hernandez introduced the California Senate Constitutional Amendment No. 5 (SCA-5), a pro-affirmative action initiative.¹⁵⁷ SCA-5, if approved by two-thirds of the legislature, would have asked voters to consider eliminating California Proposition 209 and its ban on the use of race, sex, color, ethnicity, or national origin in recruitment, admissions, and retention programs at California public institutions.¹⁵⁸ To the surprise of many observers, including even Asian American politicians, SCA-5 faced vehement opposition from many Asian Americans, leading to its downfall.¹⁵⁹

153. See Julianne Hing, *Wanted: Disgruntled Asian-Americans to Attack Affirmative Action*, COLOR LINES (Apr. 25, 2014), http://colorlines.com/archives/2014/04/wanted_disgruntled_asain_american_to_attack_affirmative_action.html.

154. See Symposium, *Diversity on Trial: Grutter v. Bollinger*, 8 TEX. HISP. J. L. & POL’Y 7, 28–29 (2002) (“Also, to counter a point made earlier, I worked on the Proposition 209 campaign when I lived in California, and it was predominated by [A]sians, so it is not true that across the board [A]sian [A]mericans do not feel slighted by affirmative action; by and large they are, and that is a fact. In addition, the Proposition 209 campaign was filled with people who were civil rights activists from the 60s who came back because they felt that the program they had worked so hard on had been misconstrued and misapplied.”).

155. Variation of Uncle Tom – image of subservience to white hierarchy.

156. This problem parallels the more general concerns recently raised about the intellectual coddling of college students. See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sep. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>. Political bias in academia itself may have had a detrimental effect on the quality of scholarship. See José L. Duarte et al., *Political diversity will improve social psychological science*, BEHAVIORAL AND BRAIN SCIENCE, (2015).

157. Melanie Mason, *Assembly shelves college affirmative action measure*, L.A. TIMES, Mar. 17, 2014, <http://www.latimes.com/local/political/la-me-ln-assembly-shelves-college-affirmative-action-measure-20140317-story.html>.

158. *Id.*

159. Frank Shyong, *Affirmative action amendment divides state’s Asian Americans*, L.A. TIMES, March 18, 2014, <http://www.latimes.com/local/la-me-asian-divisions-20140519-story.html>.

Unfortunately, the media's portrayal of Asian American opposition to SCA-5 was demeaning in many ways. The *LA Times*, for instance, described the opposition as "recent immigrants from mainland China and elsewhere, [who] seem to enter political life only when an issue attracts them."¹⁶⁰ Supporters of SCA-5 further accused the opposition of defeating the measure with "misinformation and scare tactics."¹⁶¹ In contrast, the *Times* described those favoring SCA-5 as "younger Asian Americans and older immigrants who are typically Democrats with a history of forming political coalitions with blacks and Latinos to elect Asian officials and achieve policy goals."¹⁶² This juxtaposition seems to imply that opponents of affirmative action are selfish and un-American.¹⁶³ The narrative here ignores the possibility that an admittedly large segment of the Asian population could reach a contrary conclusion without being misinformed.

Furthermore, it is more appropriate to conclude that conservatives exploited and perhaps enhanced the degree of these concerns, rather than manufacturing them completely. For Matsuda's and similar scholars' "bad white" person theory to be fully consummated, opponents of affirmative action and the scholars whose studies they rely upon¹⁶⁴ need to have been in cohorts or driven by the same self-serving ideology as one another. While possible, it is more likely that the politicians took empirical results from these studies and ran with them, imposing their own stories onto the findings for their own convenience. While dishonest, these actions do not mean that the issue raised is a complete fabrication without a kernel of validity worth further examination. This oversimplification of the opposition likely stems from fears that a hint of harm to Asian Americans will lead the community as a whole to abandon affirmative action. Asian American supporters of affirmative action may very well have adopted their particular definition of negative action due to these fears. Despite citing Kang's work, several Asian American scholars and interest groups have maintained that affirmative and negative action are mutually exclusive—a view Kang himself did not endorse, at least in his original piece on affirmative action.

2. Misrepresentation of Asian American Support for Affirmative Action

Similarly troubling, affirmative action supporters have sought to

160. *Id.*

161. *Id.*

162. *Id.*

163. See also OiYan Poon, HATE, FEAR AND LIES: HOW ANTI-AFFIRMATIVE ACTION HATERS ARE SHOVELING BULLSH*T ABOUT SCA5, Angry Asian Man Blog (Mar. 10, 2014), <http://blog.angryasianman.com/2014/03/hate-fear-and-lies-how-anti-affirmative.html>.

164. See, e.g., THOMAS J. ESPENSHADE & ALEXANDRIA W. RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE ADMISSION AND CAMPUS LIFE (Princeton Univ. Press 2009); Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities* *Chung*, 86(2) *SOCIAL SCIENCE QUARTERLY* 293, 298 (2005).

gather support and legitimacy for their views by portraying Asian Americans as widely supportive of affirmative action. In pushing the image of widespread support, these interest groups have relied on the number of organizations that have co-signed their amicus briefs as well as public opinion polls.¹⁶⁵ Yet these assertions are not only rife with methodological issues,¹⁶⁶ but also contain a problematic presumption: amicus briefs and polls are premised on the belief that negative and affirmative action are completely separate policies.

Although many more Asian American organizations have filed and signed amicus briefs in support of affirmative action, these interest groups may merely have reflected opinions of academic elites rather than Asian Americans at large.¹⁶⁷ Given how surprised many Asian American leaders were at the objections to SCA-5 in their communities, Asian American organizations favoring the measure and affirmative action more generally may not have a strong understanding of public sentiment. Furthermore, the trend might be shifting: in *Fisher II*, the Asian American Legal Foundation and the Asian American Coalition for Education filed an amicus brief in opposition to affirmative action purportedly with the support of over 100 Asian organizations.¹⁶⁸ More importantly, Asian American organizations supporting affirmative action based their argument in large part by first distinguishing between affirmative and negative action.¹⁶⁹ Yet since negative and affirmative action are much more closely linked than previously believed, many of these arguments may be suspect.

165. Nancy Leong, *Reflections on Racial Capitalism*, 127 HARV. L. REV. F. 32, 34 (2013) (“Yet the claim that Asian students are ‘injured’ by race-conscious admissions overlooks the reality that a majority of Asians in fact support affirmative action. The National Asian American Survey found that—depending on how the survey question was asked—between 75% and 81% of Asian Americans support affirmative action”); Khin Mai Aung, *Letter to the Editor: Diverse Asian Applicants*, N.Y. TIMES (Nov. 11, 2012), http://www.nytimes.com/2012/11/12/opinion/diverse-asian-applicants.html?_r=0. (“Asian-Americans are not severely divided on affirmative action. Nearly 100 Asian-American organizations signed onto amicus briefs supporting the university, while a scant five Asian-American groups signed onto briefs supporting the plaintiff, Abigail Fisher. The National Asian American Survey’s September 2012 report found that over two-thirds of Asian-Americans support affirmative action in education and employment. In a June 2012 report, the Pew Research Center said that 61 percent of Asian respondents didn’t think their ethnic origin would affect education admissions, 20 percent thought their ethnic origin would help and only 12 percent thought it would be harmful. Diverse though the Asian-American community is, it continues to support policies that promote equal opportunity.”).

166. Yunlei Yang, *Opinion, Asian Americans would lose out under affirmative action*, L.A. TIMES (Oct. 1, 2014), <http://www.latimes.com/opinion/opinion-la/la-ol-affirmative-action-sca5-asian-americans-20141001-story.html>.

167. By elite opinion, I only aim to suggest non-responsiveness to the general public.

168. See Aung, *supra* note 166; see also Bronner, *supra* note 26; Brief for Asian Am. Legal Found. & the Asian Am. Coal. for Educ. as Amici Curiae Supporting Petitioner at 2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, available at <http://www.scotusblog.com/wp-content/uploads/2015/09/14-981-tsac-AALF-et-al..pdf>.

169. See, e.g., Brief of the Asian Am. Legal Def. and Educ. Fund et al. as Amici Curiae Supporting Respondents at *6, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3308203 at *6.

As for public opinion polls, there is always a general concern that slight changes in wording may greatly distort results.¹⁷⁰ This dilemma may be especially cogent for polls on affirmative action, because the public generally supports such policies.¹⁷¹ Public support, however, does not extend to all forms of affirmative action, especially those policies based on race.¹⁷² As many observers have recognized, the debate is not about affirmative action in the abstract, but over the criteria used in determining whom the beneficiaries will be.¹⁷³ Additionally, the polls relied upon by Asian American groups supportive of affirmative action have clearly incorporated the view that affirmative and negative action are separate policies. These advocates have relied heavily on a poll from the National Asian American Survey,¹⁷⁴ which contained the following wording: “[In order to promote diversity,] do you favor or oppose affirmative action programs designed to help blacks, women, and other minorities get better jobs and education?”¹⁷⁵ For this wording to be considered neutral, negative and affirmative action must be mutually exclusive. Otherwise, the question does not sufficiently address concerns that Asian Americans might have about the potential negative consequences of affirmative action.

Moreover, the authors of the survey were likely very aware of this biased wording. Taeku Lee, one of the authors, recalled that the survey was specifically commissioned to provide support for affirmative action.¹⁷⁶ Lee also acknowledged that he and the other authors purposefully avoided wordings that may have suggested that affirmative action harmed Asian Americans—out of concern that the results would not be as favorable.¹⁷⁷ Thus, the NAAS poll cannot be seriously considered an accurate and

170. NATHANIEL PERSILY ET AL., *PUBLIC OPINION AND THE CONSTITUTIONAL CONTROVERSY* 163 (Oxford Univ. Press 2008) (“Because the policy involves the collision of two widely held values—the principle of judging people as individuals and the desire for social equality—question wording strongly influences how survey respondents make the trade-off.”); see also Allison Kopicki, *Answers of Affirmative Action Depend on How You Pose the Question*, N.Y. TIMES, Apr. 22, 2014, <http://www.nytimes.com/2014/04/23/upshot/answers-on-affirmative-action-depend-on-how-you-pose-the-question.html?abt=0002&abg=0>.

171. PERSILY, *supra* note 171, at 165, 172; Kopicki, *supra* note 171.

172. *Id.* at 164.

173. *Id.* at 165.

174. KARTHICK RAMAKRISHNAN & TAEKU LEE, *The Policy Priorities and Issue Preferences of Asian Americans and Pacific Islanders*, 2012 NAT’L ASIAN AM. SURV. 16–17, <http://www.naasurvey.com/resources/Home/NAAS12-sep25-issues.pdf>. This NAAS poll (and the updated version) has been widely cited in amicus briefs as well as by the popular media. See, e.g., Emil Guillermo, *As Scotus Hears Affirmative Action Arguments, Asian American Advocates Weigh In*, NBC NEWS (Dec. 10, 2015), <http://www.nbcnews.com/news/asian-america/scotus-hears-affirmative-action-arguments-asian-american-advocates-weigh-n477806>.

175. RAMAKRISHNAN & TAEKU LEE, *The Policy Priorities and Issue Preferences of Asian Americans and Pacific Islanders*, 2012 NAT’L ASIAN AM. SURV. 16–17.

176. Lee, Taeku, “Blank Space: Asian Americans and Affirmative Action.” Asian American Law Journal Symposium Panelist, UC Berkeley School of Law, Berkeley, CA, March 18, 2015 (from author’s recollection).

177. *Id.*

faithful measure of Asian American sentiment. The authors' tactics indicate that they too have doubts whether Asian Americans generally support affirmative action.

3. *Misuse of Asian Americans by Conservatives and Liberals*

As a group caught between whites and other minorities, Asian Americans could potentially take on a significant position in the debate. Michael Omi and Dana Takagi, however, caution that Asian Americans can also “be manipulated in particular ways to suit particular positions.”¹⁷⁸ Although legal scholars have already extensively examined the manipulation of the Asian American narrative by white conservatives, they have overlooked similar practices by supporters of affirmative action.¹⁷⁹ By ignoring the misuse of Asian Americans by those on the left, liberal commentators have framed the discussion as one essentially between good and evil—Asian Americans can either stand in solidarity with other minorities or have their narrative appropriated by conservatives.¹⁸⁰ This oversimplification not only fails to advance the debate but also stifles the opportunity for a thorough and honest discussion. Indeed, affirmative action advocates have rampantly exploited Asian Americans. Integrating Asian Americans into the debate would undoubtedly raise questions not only about their “success” but also whether they are harmed by affirmative action, as many empirical studies suggest.¹⁸¹ To avoid addressing these concerns, the left often incorporates Asian Americans only when useful, while largely excluding them from other less convenient situations.¹⁸²

Ironically, Justice Sonia Sotomayor's dissent in *Schutte v. Coalition to Defend Affirmative Action* exemplifies the manipulative use of Asian Americans in the affirmative action debate.¹⁸³ First, Justice Sotomayor made sweeping remarks about how all minorities stood to benefit from

178. Kidder, *supra* note 13, at 609.

179. See Wu, *supra* note 12; Matsuda, *supra* note 114.

180. See e.g., Wu, *supra* note 12; Matsuda, *supra* note 114.

181. The following studies suggest racial preferences lead to potentially higher standards for Asian Americans in admissions and ultimately limitation in representation. See e.g., THOMAS J. ESPENSHADE & ALEXANDRIA W. RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE ADMISSION AND CAMPUS LIFE (2009) (finding that successful Asian Americans applicants on average have stronger academic credentials than those of other racial groups); Thomas J. Espenshade and C.Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities* Chung, 86(2) *SOCIAL SCIENCE QUARTERLY* 293–298 (2005) (“Asian Americans are the biggest winners if race is no longer considered in admissions . . . Asian Americans are at a disadvantage in admission compared to their white, African-American, and Hispanic counterparts.”).

182. See, e.g., Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, at *16 (D. Mass. Nov. 17, 2014) (“Harvard started considering Asian-American students a discrete subset of its undergraduate applicant pool in the early 1970s. At that juncture, Harvard took the position that Asian Americans students were not ‘under represented’ on its campus and therefore were not in need of ‘affirmative action.’ Harvard nevertheless included Asian Americans in its affirmative-action compliance reports to the Federal government.”).

183. *Schutte v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

affirmative action.¹⁸⁴ To demonstrate the continuing importance of race, she, in part, then referenced the stereotype of Asian Americans as “perpetual” foreigners:

Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”¹⁸⁵

Despite using this imagery to establish the continuing relevance of race, she proceeded to ignore Asian Americans completely. To demonstrate the need for affirmative action, Justice Sotomayor only used facts and figures related to African and Hispanic Americans at institutions such as UCLA.¹⁸⁶ Asian Americans were apparently only useful for her argument for certain points. Yet since affirmative action and negative action are not mutually exclusive, the experience of Asian Americans must be critically examined rather than only mentioned when convenient.¹⁸⁷

B. The Possibility of Validly Questioning Affirmative Action

Having concluded that negative action is the cause of any limits on Asian American enrollment, Wu and other commentators have overlooked the potential harms of affirmative action. Given the actual close link between affirmative and negative action, it is necessary to examine the adverse consequences of these policies simultaneously. Without an accurate assessment of affirmative action, the Asian American community and society at large will be unable to objectively determine the best course of action.

184. *Id.* at 660 (2014) (“Rather, race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities.”) (Sotomayor, J., dissenting).

185. *Id.* at 1676. Although other racial groups may also be implicated, the “perpetual foreigner stereotype” is most strongly associated with Asian Americans.

186. *Id.* at 1678–1682; Sotomayor cited to statistics from the *N.Y. Times* which also problematically left Asian Americans out of the discussion. See *How Minorities Have Fared in States With Affirmative Action Bans*, N.Y. TIMES, April 22, 2014, <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>.

187. See Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action As Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985, 1017 (2007) (“UC-Berkeley officials include Asian students into their diversity statistics when they seek to advertise how diverse the campus is, but they exclude Asian students when they mourn the reductions in African American and Latino/a representation since SP-1 and Proposition 209.”).

1. Self Interest

The main reason opponents disfavor affirmative action is likely because of self-interest: they want to gain more seats in admissions.¹⁸⁸ Nonetheless, it is important to recognize that, in practice, the dispute over affirmative action is often motivated by self-interest by every group involved. Some Southeast Asian Americans, for example, have argued that affirmative action is necessary in order for their subgroups to be adequately represented.¹⁸⁹ Even recognized beneficiaries of affirmative action have at times sharply criticized the allotment of seats. Some African Americans, for instance, have argued that too many seats that rightfully belong to them are instead allocated to African immigrants.¹⁹⁰ Given the limited number of

188. Although much of the discussion has centered on undergraduate admissions, there are potentially important ramifications for the legal community. One of the amicus briefs in *Fisher I*, for instance, asserted that affirmative action was needed at the undergraduate level to serve as a pipeline for future lawyers.. Brief of the Coalition of Bar Associations of Color as Amici Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308202; see also *Bollinger*, 539 U.S. at 308 (J. O'Connor "Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders . . .") (internal citation omitted). Furthermore, the legal industry is driven, perhaps more so than any other, by prestige. See e.g., Wendy Espeland & Michael Sauder, *Fear of Falling: The Effects of U.S. News & World Report Rankings on U.S. Law Schools*, 2007 LSAC RESEARCH REPORT SERIES at 2, available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-07-02.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-07-02.pdf) ("[R]ankings shape how members of the law school community interpret their own and others' status, and they influence members' identification with their schools."). Problematically, Asian Americans have been treated similarly in law school admissions as in undergraduate admissions. Originally considered underrepresented in 1970s and 1980s, Asian Americans were often incorporated into affirmative action programs. Lee, *supra* note 31, at 137-38. Once Asian Americans became "overrepresented," however, they were often excluded from diversity programs. See Lee, *supra* note 31, at 137; Muratsuchi, *supra* note 68, at 111 ("Affirmative action for Asian Americans, particularly Chinese and Japanese Americans, continued to be controversial among the faculty, and the admissions reading teams were widely inconsistent in their evaluation of Asian American applicants. According to Michael Rappaport, Assistant Dean of Admissions, in one year, one of the teams decided not to admit any Asian American students."); Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 522 (2004) ("By 2003, most affirmative action programs in higher education did not include Asian-Americans as underrepresented minorities."). These changes over time underscore the importance of statistical parity in affirmative action policies in law schools. Lee, *supra* note 31, at 137-38. The only development justifying the change in treatment appears to be increased representation. Nonetheless, unlike with undergraduate admissions, there are few comprehensive studies examining the impact of racial preferences on law school admissions. *But see* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

189. See, e.g., Kalia Vang, Rally for Affirmative Action, Southeast Asia Resource Center (SEARAC), available at <http://www.searac.org/blog-post/rally-affirmative-action-0>. Other non-Southeast Asian Americans also often support affirmative action for the same reasons. See Bryan T. Ikegami, *An Urgent Opportunity: Unifying the Asian American Stance on Affirmative Action*, 17 ASIAN PAC. AM. L.J. 82 (2012) ("Where do Asian Americans fit into this? Based on historical data, the Japanese, Chinese, and Koreans will attend prestigious schools and the Hmong and Laotians will not. Is this an acceptable result? As long as the Asian American community remains divided on this issue, we may have no other choice.").

190. Erin Fuchs, *Professor: Affirmative Action Isn't Helping The Right People*, BUSINESS INSIDER, May 20, 2013, <http://www.businessinsider.com/kevin-brown-on-affirmative-action-2013-5>; Richard Rothstein, *Why we still need affirmative action for African Americans in college admissions*, WASH.

spots at elite institutions, every racial group and subgroup is to some extent driven by motivation to enlarge their own share of the rewards, rather than the desire to promote an optimal level of diversity for everyone.

The infighting among subgroups also further highlights the importance of statistical parity and the Proportionate Ideal in the debate. In both examples, illustrated above, the critical group perceives itself as a subgroup of a larger group that has been recognized by others for purposes of affirmative action. Although it is plausible that both subgroups are concerned about the general limited nature of seats at elite institutions, it is more likely that each group has been driven by the possibility of losing its share to other subgroups in the larger pan-ethnic group. South Asian Americans, for instance, have asserted that other Asian subgroups would come to replace them if not for affirmative action.¹⁹¹ In these cases, the use of statistical parity and the Proportionate Ideal has worked to constrain the representation each larger racial group can achieve—thus leading to disagreement among subgroups. Furthermore, the arguments made by dissatisfied subgroups often portray competitor subgroups as having had advantages historically or socioeconomically.¹⁹² Essentially, underrepresented subgroups assert that affirmative action is necessary to cancel out the advantages enjoyed by better-represented subgroups.

The interest-based conflicts over affirmative action also help explain the highly charged nature of the debate. Changes in policy inevitably lead to gains for some individuals and groups and losses for others. For beneficiaries of current or past programs, arguments for eliminating or drastically limiting existing policies are likely perceived as a personal attack—as if they did not deserve or were not worthy of the benefits they received.¹⁹³ Similarly, for Asian Americans, the constant change in admissions policies may also feel personal. New policies often appear to be instituted to try to create a “better mix,” which under the Proportionate Ideal necessarily requires fewer Asians—instilling the impression that they

POST, July 3, 2014, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/07/03/why-we-still-need-affirmative-action-for-african-americans-in-college-admissions/>; see also Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1; Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 504 (2005) (“Nevertheless, the mixed message about affirmative action under Bakke and Grutter may be found in a comment by Henry Louis Gates Jr., chair of Harvard’s African and African American Studies Department: ‘The black kids who come to Harvard or Yale are middle class. Nobody else gets through.’”).

191. Bronner, *supra* note 26.

192. See Robert S. Chang, *Reverse Racism! Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115, 1127–28 (1996) (noting that “care must be taken to acknowledge the tremendous diversity within the Asian American community so that the relative success of Chinese Americans, Japanese Americans, and Korean Americans will not obscure the very different situations of the other Asian American groups”).

193. See Brown, *supra* note 99, at 1312 (“Rather, Yale Law School admitted me based solely on merit; however, its enlightened definition of merit rejected the color-blind approach to easily measurable academic credentials.”).

are the targets of any changes.¹⁹⁴

Lastly, it is crucial for even Asian American proponents of affirmative action to carefully examine the impact their own interests have had on their beliefs. On one hand, given the potential negative impact of affirmative action, Asian American supporters may be viewed as selfless. Wu, Kang and other scholars, in fact, have written and spoken about the need to look “beyond self-interest.”¹⁹⁵ As these scholars suggest, critics of affirmative action need to consider the potential benefits of affirmative action to not only Asian Americans but also American society as a whole. Yet many advocates of affirmative action also need to consider the privileges they have enjoyed under the current system. Many supporters in academia and elsewhere have benefited from the status quo, both in terms of their individual inclusion (admission) into elite schools and the positive effects of diversity at such institutions. Given their own positive experiences, these commentators have to guard against viewing the issue solely through the lens of a privileged participant. As Wu, Kang and others have themselves detailed, Asian Americans have often been unfairly assessed and treated as members of a monolithic group rather than as individuals.¹⁹⁶ Unless they view themselves as truly unique among Asian Americans, Wu, Kang and many other beneficiaries should recognize that there are many others who could have stood in their shoes but never had the opportunity to do so. No matter our stance on affirmative action, we have a responsibility to think about the other groups and individuals who may be adversely affected should our beliefs prevail.

There is no disagreement among Asian American legal scholars that Asian Americans are disfavored in admissions under current policies. The conflict instead has been over the cause of the “ceilings” imposed upon Asian students. Many scholars in support of affirmative action have argued that negative rather than affirmative action is responsible for the discrimination against Asian Americans.¹⁹⁷ Under the belief that negative

194. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 880-881 (1995); Tsuang, *supra* note 55, at 674 (“While Berkeley may have a legitimate interest in assuring the English competence of its students, the Chancellor never acknowledged and repeatedly denied the existence of a minimum verbal score. Finally, under pressure from the Asian community, the Chancellor admitted that such a policy had indeed been adopted in 1984, but was withdrawn after a brief time. The dispute fueled suspicion that Berkeley had covertly adopted guidelines which, though neutral on their face, caused an inevitable or foreseeable drop in Asian American admissions.”); Kyle Spencer, *For Asians, School Tests Are Vital Steppingstones*, N.Y. TIMES, Oct. 26, 2012, <http://www.nytimes.com/2012/10/27/education/a-grueling-admissions-test-highlights-a-racial-divide.html> (“[M]ore than a few [Asian families] saw the criticism of the [high school entrance exam] as an attack on their cultures, as troubling to them as grumblings about the growing Asian presence in these schools and the prestigious colleges they feed into.”).

195. See Chin, *supra* note 123.

196. See *id.*

197. See Kang, *supra* note 13; Matsuda, *supra* 114; Brief of the Coalition of Bar Associations of Color as Amici Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308202; Brief of the Asian American Legal Defense and

and affirmative action are separable, these scholars have challenged the conclusion of many empirical studies that find that affirmative action has hurt Asian Americans.¹⁹⁸ These scholars believe that ceilings have been imposed on Asian Americans due to fear of whites being crowded out due to competition with Asians.¹⁹⁹ To support their argument, scholars have pointed at such policies employed in the past by certain institutions like Brown University, which purposefully limited Asian enrollment to maintain white acceptance rates.²⁰⁰ They have also focused on legacy admissions preferences, which still exist in most institutions and generally favor white applicants above all others, including Asians.²⁰¹

As explored earlier, race-based affirmative and negative action, however, are much more closely linked than previously articulated. Since race-based affirmative action policies necessarily make use of parity figures and are thus premised on the Proportionate Ideal, affirmative action and negative action share a common origin. Their shared premise can be further identified by both the need to explain the “overrepresentation” of Asian Americans at elite institutions and the parallels in the justifications provided. Affirmative action and negative action thus work to reinforce each other to limit Asian American admissions. Most limits in admissions therefore cannot be clearly attributed separately to either affirmative or negative action. Only legacy admissions can likely be so easily distinguished.²⁰²

Education Fund, et al. as Amici Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308203.

198. See, e.g., Kidder, *supra* note 13, at 617–20.

199. See, e.g., Matsuda, *supra* note 114.

200. Rich, *supra* note 119, at 585 n.49.

201. See Higdon, *supra* note 116, at 187.

202. This Article does not dispute that legacy admissions are unfair and should be eliminated.

2. General Devaluation of Asian Identity²⁰³

Given the adherence to the Proportionate Ideal, the overrepresentation of Asian Americans has forced, explanations for their success. These explanations have cast Asian Americans as having advantages over other groups and have questioned the idea of merit itself in terms of educational performance. In addition to these rationales, the actual exclusion from affirmative action policies has generated the impression of Asian Americans as being “non-diverse,” implying that they do not have intrinsic value as compared to other minorities.²⁰⁴ These explanations have not only been used to exclude Asian Americans from affirmative action policies, but also to justify negative action policies as between Asians and whites. Thus, these explanations have served to diminish the accomplishments of Asian Americans, even if for a good reason.²⁰⁵ Furthermore, “overrepresentation” itself has helped promote an image of Asian Americans as not being subject to discrimination. All these portrayals have, in turn and together, devalued the Asian American identity.

Students should not have to be ashamed of their identity. The recent trend in how Asian American applicants identify themselves highlights the devaluation in effect. A growing number of Asian Americans and multi-racial Americans, for example, have avoided identifying themselves as Asian on college applications.²⁰⁶ Students do so under the belief that they

203. In fairness, the discussion relating to Asian Americans is already colored by various stereotypes including that of the “perpetual foreigner.” See Elbert Lin, *Identifying Asian America*, 33 SW. U. L. REV. 217, 252 (2004); Adela de la Torre & Rowena Seto, *Can Culture Replace Race? Cultural Skills and Race Neutrality in Professional School Admissions*, 38 U.C. DAVIS L. REV. 993, 997 (2005). Asian Americans, for example, are often considered “model minorities,” in part out of the belief they have “foreign” values, beliefs or “culture.” On the other than, Asian Americans are also “advised” specifically to rethink their “foreign” ideas and values when it comes to schools and education. See Allison Singh, *College Admissions and the Asian-American Parent*, HUFFINGTON POST, http://www.huffingtonpost.com/allison-singh/college-admissions-and-th_1_b_3255465.html, (“In many Asian countries, where you go to college determines the course of your professional life. It makes sense that Asian-American parents would think the same holds true in the U.S. . . .”); see also Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139, 153 (1997) (“This ‘UC Riverside is just as good as UC Berkeley’ logic should apply to targeted minority students as well. It is never explained why UC Santa Cruz equals UC Berkeley for white and Asian-American students, but not for preferred minority students. Or why, for example, deferred admission to UC Berkeley is considered the equivalent of a direct admission for in-state white and Asian-American students, when this same standard apparently is not applied to targeted minorities, some of whom are wealthy or out-of-state residents.”).

204. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2172 (2013) (“For instance, overrepresentation of Asian students in higher education has led to their exclusion from many affirmative action programs, indicating a devaluation of their nonwhiteness.”).

205. “Good reason” is a reference to desire to prevent the use of Asian American “success” against other minorities.

206. Susan Saulny & Jacques Steinberg, *On Complex Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES, http://www.nytimes.com/2011/06/14/us/14admissions.html?pagewanted=all&_r=0&gwh=8020FBD4CD9B7953EA3BED2BFFD6F4D6&gwt=pay; Jessie Washington, *Some Asian Students Don’t Identify As Asian for College Admissions*, HUFFINGTON POST, Dec. 4, 2011,

will be disadvantaged otherwise. Their parents, friends, and even guidance counselors also encourage them to do so.²⁰⁷ Although most students act in this manner for strategic purposes, there should be concerns that some students will internalize these beliefs—that being Asian, in and of itself, hinders their future.²⁰⁸ Some students might come to believe that they or their peers are not “diverse” or hold no other desirable characteristics other than high test scores and grades. Unfortunately, self-identification policies seem to be indirectly encouraging such thoughts. Moreover, the very denial of one’s identity is troubling. As one student who did choose to identify her Asian heritage put it, “I felt very uncomfortable with the idea of trying to hide half of my ethnic background. It’s been a major influence on how I developed as a person. It felt like selling out, like selling too much of my soul.”²⁰⁹

Similarly, students have been encouraged to highlight qualities that are “not Asian.” Given the limits on Asian American enrollment and the overabundance of qualified applicants at elite institutions, admissions officers have rewarded candidates who appear “less Asian.”²¹⁰ Although schools should aim to admit a diverse student body, the qualities and narratives that admissions officers penalize are extremely troubling. James Chen, a professional admissions consultant, for example, advises Asian clients not to write about their immigrant backgrounds: “Don’t talk about your family coming from Vietnam with \$2 in a rickety boat and swimming away from sharks.”²¹¹ Even if many Asian Americans have similar experiences, students should never be punished for sharing genuine and

http://www.huffingtonpost.com/2011/12/04/some-asian-students-dont-_n_1128037.html.

207. Jesse Washington, AP, “Some Asians’ college strategy: Don’t Check ‘Asian’”, USA Today, 2011, available at <http://usatoday30.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1>

208. Even filling out forms can have strong psychological effects. See Claude M. Steele & Joshua Aronson, *Stereotype threat and the intellectual test performance of African Americans*, JOURNAL OF PERSONALITY AND SOC. PSYCHOLOGY 69(5): 797–811 (1995) (examining “role of stereotype vulnerability in the standardized test performance of ability-stigmatized groups”). See also Wu, Yi-Chen (Jenny), University of Georgia, “Admission Considerations in Higher Education Among Asian-Americans,” American Psychology Association, <http://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission.aspx> (“The fear of self-identifying as Asian can affect one’s racial/ethnic identity development and have an impact on one’s mental health. Asians who did not possess a strong racial/ethnic identity rated lower scores on self-actualization and acceptance, reported lower self-esteem, tended to have negative attitudes toward schooling, lower academic achievement, and could not manage race-related stress well. The denial of Asian heritage may also lead to the denial of Asian values, which may create cultural gaps and intergeneration conflict between the students and their parents. The psychological effects of this type of conflict include emotional distance between parents and children, interpersonal problems, lack of self-confidence and assertiveness, high suicidal risk, and anxiety and depression.”) (internal citations omitted).

209. Washington, *supra* note 207.

210. Bella English, *To get into elite colleges, some advised to ‘appear less Asian’*, THE BOSTON GLOBE, June 1, 2015, <https://www.bostonglobe.com/lifestyle/2015/06/01/college-counselors-advice-some-asian-students-appear-less-asian/Ew7g4JiQMiqYNQIIwqEluO/story.html>.

211. *Id.*

meaningful narratives of who they are, especially to avoid discrimination.

Relatedly, the devaluation of Asian American identity is also evident when schools themselves are considered “too Asian.”²¹² When making such racist comments, people not only criticize the high number of Asian students but also the type of culture they bring to the school.²¹³ The brazen nature of this discussion is especially concerning. Rather than being made anonymously or in hushed tones, these comments are often made publicly with the disclaimer that they are not “racist.”²¹⁴ These widely shared and *openly* expressed sentiments highlight just how devalued the Asian American identity has become.²¹⁵

III. THE FUTURE OF AFFIRMATIVE ACTION

A. Benefits and Problems of Current and Proposed Policies

1. Diversity

Even if there are potential harms to affirmative action, there may still be gains that outweigh the benefits of eliminating or revising such policies. Affirmative action advocates have made strong arguments to that effect. In *Grutter*, for example, the Justices found especially compelling many of the amicus briefs filed on behalf of business professionals and army officers detailing the positive potential of diversity.²¹⁶ Therefore, Asian Americans

212. Nancy Bruni, *Opinion: Too Asian?*, FORT GREEN: N.Y. TIMES, Oct. 14, 2011, <http://fort-green.thelocal.nytimes.com/2011/10/14/imho-too-asian/>; Stephanie Findlay & Nicholas Kohler, *The enrollment controversy: Worries that efforts in U.S. to limit enrollment of Asian students in top universities might migrate to Canada*, MACLEANS, Nov. 10, 2010, <http://www.macleans.ca/news/canada/too-asian/>.

213. Findlay & Kohler, *supra* note 212.

214. Bronner, *supra* note 26 (“I fear that if affirmative action is overthrown by the Supreme Court, our elite campuses will look like U.C.L.A. and Berkeley,” Mr. Burgarin said. “That wouldn’t be good for Asians or for anyone else.”). Although Mr. Burgarin would likely agree that statements suggesting that there were “too many” Jewish or homosexuals students are bigoted, he and many others appear untroubled voicing similarly discriminatory sentiments about Asian Americans.

215. Carolyn Chen, *Asians: Too Smart for Their Own Good?*, N.Y. TIMES, Dec. 19, 2012, http://www.nytimes.com/2012/12/20/opinion/asians-too-smart-for-their-own-good.html?_r=1& (“At Northwestern, Asian-American students tell me that they feel ashamed of their identity — that they feel viewed as a faceless bunch of geeks and virtuosos. When they succeed, their peers chalk it up to ‘being Asian.’”); Kyle Spencer, *For Asians, School Tests are Vital Steppingstones*, N.Y. TIMES, Oct. 26, 2012, <http://www.nytimes.com/2012/10/27/education/a-grueling-admissions-test-highlights-a-racial-divide.html> (“Meanwhile, a parent on a popular education e-mail list referred to the ‘Asian-ification’ of the elite schools, and a post on Urban Baby grumbled about ‘Asian kids taking all the spots because they prep excessively.’”).

216. *Bollinger*, 539 U.S. at 330–31 (“These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’”) (internal citations omitted).

as a group and as individuals might greatly benefit from diversity despite the potential negatives.

Nonetheless, whatever the value in diversity might be, affirmative action most directly affects individuals. Therefore, even if society indeed benefits overall, it is still important to recognize what each displaced²¹⁷ individual might be giving up.²¹⁸ Many students are drawn to high-ranking institutions because the schools are considered “elite.”²¹⁹ Although diversity can potentially help enhance the appeal of any school, it would be surprising if that were the main reason for choosing an institution such as Harvard. Displaced students thus lose the opportunity to gain the main benefit of attending elite institutions.²²⁰

2. *The Minority Myth Cutoff*

Many commentators assert that affirmative action not only provides Asian Americans benefits from diversity but also allows for fairer treatment of disadvantaged subgroups. Since *Bakke*, many affirmative action supporters have called for stronger recognition of the differences between the many Asian American ethnic groups.²²¹ Given the wide variety

217. Students who are not admitted but for the diversity program.

218. Some have argued that since it is net societal benefit that is the issue at stake, invoking individual losses is unfair and a convenient distortion of the problem. However, there are two issues with such claims. First, any benefits provided by diversity itself is first provided on an individual basis. Second, the idea of group-based benefits was introduced by proponents of affirmative action in the first place. To argue that others are not allowed to discuss burdens placed on individuals is to forget that the focus on group or society wide benefits was a rationale pushed for by advocates rather than necessarily a required starting point.

219. “Elite” may refer to a variety of measures including the school’s reputation, prestige, quality of education, resources or a combination of these and other characteristics.

220. As noted before, at law schools, the “main benefit” is a little more complicated given the importance of grades and the existing curves.

221. Ikegami, *supra* note 189 at 99 (“It is important that we unite around a strong, inclusive stance on affirmative action and adopt the position that all Asian American subgroups deserve recognition when it comes to affirmative action.”); Deana K. Chuang, Power, Merit, and the Imitations of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School, 8 *ASIAN L.J.* 31, 39 (2001) (“Notions of an essentialistic proclivity in all Asian Americans overlook the fact that the Asian American community is not monolithic and that many deserving Asian Americans should and do benefit from affirmative action in higher education. In certain fields of study . . . Asian Americans benefit from affirmative action in recruitment and diversity policies in hiring. Furthermore, Southeast Asian refugees from Vietnam, Laos, Cambodia, and Hmong communities experience economic, educational, and cultural hardships, debunking the model minority myth that all Asian Americans are successful and wealthy. In fact, 35 and approximately 70 percent of Vietnamese and Laotian Americans, respectively, live below the poverty level.”); Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 *U.C. DAVIS L. REV.* 545, 567 (2005) (“The Supreme Court cannot assume that the experiences and achievements of all Asian American ethnic groups are uniform for equal protection purposes. By doing so, it ignores the ethnic groups which have just as much to gain from affirmative action as African Americans and Hispanics.”); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855, 855-56 (1995) (discussing a statement by the Stanford Asian and Pacific Islander Law Students Association (APILSA) that described the Asian community as a heterogeneous group with diverse experiences” that should receive some, rather than

of experiences amongst Asian Americans, these advocates have argued that certain subgroups should be included in affirmative action programs. Specifically, they have pointed to the substantially lower socioeconomic status and educational attainment of such groups.²²² These advocates also believe that underrepresented subgroups will lose to other more “successful” Asian subgroups without affirmative action in the zero-sum game of admissions. This view has come to dominate Asian American legal scholarship.²²³

Differentiating the various Asian ethnicities is appealing for several reasons. First, it provides an opportunity to recognize the simple fact that Asian Americans are not a monolithic group. Second, a more “nuanced” approach to Asian diversity seems to comport with basic ideas of fairness. Some Asian subgroups certainly are not doing nearly as well as others. As a consequence, it seems only right to make sure these groups benefit from affirmative action policies and have increased access to higher education.

This approach, however, does not necessarily eliminate or diminish many of the same problems Asian Americans face under current affirmative action policies. As discussed, the overrepresentation of Asian Americans has created the problematic and false view that Asians are not subject to discrimination. The differential treatment of the various Asian subgroups does not eliminate this problem. Instead, it naturally leads to the conclusion that some Asian groups experience discrimination while others do not. Indeed, such a division may exacerbate the view that excluded groups such as the Chinese or Japanese do not experience discrimination; conceptualized in another way, the division can be seen as likening some groups as “honorary whites” and others as “constructive blacks.”²²⁴ Thus, addressing the disadvantages of particular subgroups of Asian Americans fails to truly account for the unique position Asian Americans, as a whole,

no, preferential consideration in admissions decisions, particularly with respect to Pacific Islanders, Filipinos, and Southeast Asians); Loh, *supra* note 120; Yena Lee, Note, *Asian Americans and Affirmative Action: Through the Study of Fisher v. University of Texas*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 127, 128 (2013) (discussing recognition of “disadvantaged members of the Asian American community” for affirmative action programs); Pam Wang, Note, *Reaction to: Asian Americans and Affirmative Action: Through the Study of Fisher v. University of Texas*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 141, 141 (2013) (arguing for “nuanced approach to Asian Americans and affirmative action”).

222. See Ikegami, *supra* note 189 at 94 (educational attainment); Chuang, *supra* note 223, at 39 (socioeconomic status).

223. See, e.g., Chang, *supra* note 192, at 1127–28; Wu, *supra* note 12, at 245–46; Ikegami, *supra* note 191; Chuang, *supra* note 221, at 39; Gee, *supra* note 11, at 246–47; Choy, *supra* note 221, at 38; Brest & Oshige, *supra* note 221, at 55–56; Loh, *supra* note 120; Lee, *supra* note 221, at 128; Wang, *supra* note 221, at 141.

224. These terms describe which extreme an in-between group is most closely aligned. See Wu, *supra* note 12, at 283. Whether an Asian American subgroup is included or excluded from affirmative action programs appears dependent on whether they are considered more similar to whites or blacks. Simply about how Asian Americans rather than being viewed essentially as their own unique group/identity, understood through an application of the black-white binary.

occupy in the debate given their in-between status. Rather, the approach is a variation of the black-white paradigm. Instead of eliminating the devaluation of Asian American identity, it legitimizes the devaluation of some groups.²²⁵ These “cutoffs” also fail to capture, as a descriptive matter, the great variety existing within subgroups as well.²²⁶

Furthermore, “less successful” Asian subgroups may not benefit from the continued existence of affirmative action. First, many schools may not differentiate among the various Asian ethnicities. The advocates of this approach themselves have acknowledged that Asian Americans have been increasingly treated as a monolithic group. Given this reality, for underrepresented Asian subgroups to benefit, existing programs will need to be overhauled dramatically. Moreover, many programs purportedly benefiting such groups do not actually do so in practice.²²⁷ Second, being included in diversity programs may harm underrepresented Asian subgroups. Many affirmative action programs have an established hierarchy even among the intended beneficiaries.²²⁸ For instance, many programs seek to promote Hispanic and African American representation, but often favor the latter group.²²⁹ Due to the limited number of spots at high-ranking schools, an Asian American subgroup, while considered a “minority” in academic discussions, might ultimately be subordinated to other “targeted” minorities as schools implement their affirmative action policies.²³⁰

3. Importance of controlling our own narrative

Whether Asian Americans choose to support or reject affirmative action, it is absolutely crucial that our community maintains ultimate control over our narrative. Wu has aptly described Asian Americans as “neither black nor white.”²³¹ Yet while he rightly criticizes the manipulation of Asian American achievements by white conservatives, Wu advocates for our community to “side” with other minorities without regard to our own interests, and more importantly, to our own narrative. Wu believes that “whether we like it or not,” “at the end of the day [the debate over affirmative action] isn’t [about] race beyond Black and White” and

225. See also Leonard M. Baynes, *Who is Black Enough for You? An Analysis of Northwestern University Law School’s Struggle over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 229–30 (1997) (“Some social commentators believe that the expansion of the White race is continuing and that groups like Asian Americans are increasingly being considered ‘White.’”).

226. It may also be difficult to determine which subgroups should receive preferential treatment.

227. Chew, *supra* note 76, at 83 (“Some affirmative action programs expressly exclude Asian Americans, while others ostensibly benefit Asian Americans but in practice do not.”).

228. See Daniel Golden, *Harvard Targeted in U.S. Asian-American Discrimination Probe*, BLOOMBERG, Feb. 2, 2012, <http://www.bloomberg.com/news/2012-02-02/harvard-targeted-in-u-s-asian-american-discrimination-probe.html>.

229. *Id.*

230. Chew, *supra* note 76, at 87.

231. Wu, *supra* note 113, at 201.

that our decision will “indicate” which side we have chosen to support.²³² By framing the decision itself as indicative of whether we are choosing to “behave like whites” or stand with other minorities, Wu intentionally neglects our community’s unique experiences.²³³ Not only does Wu fear the misuse of Asian Americans’ “success” to further conservative causes, he essentially asserts that any criticism or rejection of affirmative action cannot be recognized as an independent choice untainted by a history of discrimination against other minorities.

While Asian Americans should be wary of the misappropriation of our concerns and experiences by others, the solution is not to allow one group to dictate our narrative to prevent another from doing the same. Ironically, despite calling for “holistic review” in admissions, Wu and like-minded commentators essentially argue that Americans are incapable of taking a more nuanced, “holistic” view of Asian Americans as a community. Instead of seeking to educate the public at large about the variation within our community, sub-communities, and the various ways affirmative action not only help but also hurt Asian Americans, Wu asks our community to live in the shadows once again, and allow others and ourselves to approach the issue through a black and white binary.

Wu’s stance, in this regard, is troubling. Practically speaking, it hurts our community’s ability to influence the debate—including in ways that are hurtful to Wu’s own views. If Asian Americans are negatively impacted by affirmative action, for example, and yet are still willing to support it, it creates a powerful image of the true benefit of such programs. Furthermore, such an understanding could at the very least provide opportunities to oversee how such programs, if allowed, are implemented—perhaps through increased transparency. More importantly, there is inherent value to having our authentic narrative heard. Our very understanding of Asian American identity has long been imposed upon us.²³⁴ Given such a deplorable history, the opportunity to shape our narrative truthfully and accurately should not be lost upon us. There is substantial value in having our grievances heard and to having a true seat at the table.

Even if Asian Americans support affirmative action, it is crucial that such a decision is made and understood as one of our own choosing, after careful consideration. Otherwise, we risk being viewed and treated as “second-class” minorities.²³⁵ Wu himself stated that his views were

232. *Id.* at 211–12.

233. *Id.* at 211.

234. Asian American pan-ethnicity evolved in part from political protest rather than shared identities. Asian Americans often came together in order to increase their odds of receiving government benefits as well as in response to violence against them. The Vince Chin incident, a killing based on mistaken ethnic identity, was an especially important moment in the development of Asian American pan-ethnicity. See YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES*, 30–60, 130–160 (Philadelphia: Temple University Press 1992).

235. Paralleling the arguments that Asian Americans are often treated as “second-class aliens.”

strongly influenced by Toni Morrison's claim that Asian American and other immigrants' successes may have occurred "on the back of Blacks."²³⁶ While Asian Americans and society at large should recognize the sacrifices made by African Americans in the progress of civil rights, it is dangerous to allow such reasoning to dictate, rather than inform, decisions on policy.

This rationale can be used to ignore our community's concerns and the experiences of our individual members if such narratives are inconsistent with the aims of other minorities. At Claremont McKenna College, for instance, a female Asian student was effectively silenced by activists who sought to provide "safe places" for people of color.²³⁷ Although the student had simply been recounting her own experiences with racism, many of the students turned on her when she expressed how she had been previously discriminated against by an African American man and that society needed to recognize that all people, including blacks, could hurt others. While the reaction to the Asian student should not, first and foremost, be misappropriated to negate any of the valid concerns that prompted the gathering, this leads us to wonder: is her story not just as genuine and worthy of recognition as those of the people who jeered her? By giving greater voice to the Asian American community's own experiences and perspectives, other groups may be better able to understand our concerns and choices, ultimately fostering true "solidarity" based upon mutual respect.

CONCLUSION

Given that affirmative action and negative action are much more closely linked than previously thought, more dialogue about the future course of action is needed. Many scholarly works have dismissed the possibility that affirmative action may harm Asian Americans. Moreover, current discourse and the "new" solution embrace the belief that Asian Americans need affirmative action to benefit certain "subgroups." Yet, these benefits concurrently reify the very problems supporters of affirmative action have mentioned. This logic essentially seems to create a cutoff among groups to whom the model minority myth (and all its troubles) can be applied. Given the lack of discourse and the inadequacy of the current discussion, more of an effort must be made to figure out not only the true ramifications of affirmative action, but also the issue of whether the benefits to both Asian Americans and society in fact are worth the trouble. Otherwise, Asian Americans will essentially be "taxed" without true representation.

See Chin et al., *supra* note 123.

236. Wu, *supra* note 113, at 211.

237. *See* Rob Trent, "Safe Space" *Students Silence Asian Woman for Saying "Black People Can Be Racist,"* YouTube (Nov. 12, 2015), <https://www.youtube.com/watch?v=A8UTj8lQJhY>.

As a call for more nuanced discourse, this paper does not seek to provide a panacea for the discussed ills. In fact, if the benefits are still found to outweigh the potential harms, affirmative action as currently composed might in fact be the best solution. Furthermore, others have sought to provide various alternatives, most notably class-based affirmative action.²³⁸ Although such solutions are attractive, socioeconomic and geographic factors may not fully take into account the history of unique discrimination faced by African Americans.²³⁹ Suggestions that a solution to promote affirmative action and not limit Asian enrollments would be easy to find,²⁴⁰ are, furthermore, inaccurate. The link between affirmative and negative action pinpoints the complex nature of the problem: because race-based affirmative action necessarily requires the use of parity evidence, both policies are based upon a belief in the Proportionate Ideal, which works to constrain Asian enrollment.

Nevertheless, despite the lack of a definitive course of action (other than the development of more dialogue on the issue), there is one course of action that this paper does not endorse: schools should not admit students solely based on grades and test scores. There has been a false perception that any Asian American who might question affirmative action must equate merit simply as the highest test scores and grades.²⁴¹ That certainly cannot be the case. Test scores and grades must be read in context, as even the same exact scores may represent vastly different degrees of merit depending on the opportunities afforded. The same score coming from widely differing backgrounds—whether socioeconomic, school, or by geographic area—is unlikely to reflect the same level of ability and “merit.”²⁴² Therefore, no one can seriously argue for such a simple solution.

238. See Symposium, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037 (1996); Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296 (1999); Richard D. Kahlenberg, *Class-based Affirmative Action Works*, N.Y. TIMES: The Opinion Pages Room for Debate, Apr. 27, 2014, <http://www.nytimes.com/roomfordebate/2014/04/27/should-affirmative-action-be-based-on-income/class-based-affirmative-action-works>; see also Pratheep Sevanthinathan, *Shifting from Race to Ethnicity in Higher Education*, 9 SCHOLAR 1, 41 (2006) (“Nationality and ethnicity are better indicators of diversity than race, and substituting those factors for race will alleviate many of the identification problems associated with the university application process.”); Tung Yin, *A Caribolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A.L. REV. 213, 223 (1997).

239. See Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1131 (2013).

240. See Matsuda, *supra* note 114, at 81.

241. See Ikegami, *supra* note 189; Poon, *supra* note 163.

242. Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 41 (2013) (“Today, Wayne Camara, the College Board’s vice president for research and development, attributed the gaps between black and Hispanic students and whites and Asians to access to education. A study in the *Journal of Blacks in Higher Education* attributed sharp differences in family income as a major factor for these results.”); see also Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV.

Indeed, this portrayal of Asian Americans as arguing for such a solution is likely an unfair distortion of the views of many critics.

Understandably, these distortions may be driven by the reality that the media and lawsuits against schools have centered on rejected high achieving students.²⁴³ Despite the focus on such students, it is important to recognize that affirmative action programs have worked to limit Asian enrollment, creating competition among Asian students for the limited spots accorded to them. Given this reality, “there’s an expectation that Asian Americans will be the highest test scorers and at the top of their class; anything less can be an easy reason for denial.”²⁴⁴ Thus countless Asian students who fail to meet this “prerequisite” are summarily rejected without consideration of their “diversity” and other positives qualities they have to offer. The focus on “high achieving” students should therefore be better understood as attempts to illustrate the absurd requirements imposed on all Asian Americans, rather than a call to accept only students with the highest grades and test scores.

For many Asian Americans, the concern for affirmative action instead stems from the recognized strong influence that race has on our powers of perception. It has been widely accepted and studied that race can positively or negatively affect the perception people have of others.²⁴⁵ Therefore, even for programs purporting to use race as simply one of several factors, there is concern that it will become all-encompassing given the hold race has over all of us. Race has the power not only to shade certain perceived qualities, but also to confirm our own unperceived biases.²⁴⁶ Therefore,

115, 124 (2000) (“The University of California Regents allow for consideration of economic disadvantage in admissions, but since 1995 it has had little effect on the diversity of enrollment at Berkeley simply because of the very large number of poor white and Asian students who apply.”).

243. See, e.g., Complaint, *Students for Fair Admissions Inc. v. President and Fellows of Harvard Co.*, 2014 WL 6241935, *5 (D. Mass. Nov. 17, 2014); *The model minority is losing its patience*, THE ECONOMIST, Oct. 3, 2015, <http://www.economist.com/news/briefing/21669595-asian-americans-are-united-states-most-successful-minority-they-are-complaining-ever>.

244. Sara Harberson, Opinion, *The truth about ‘holistic’ college admissions*, L.A. TIMES, June 9, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html>.

245. See, e.g., Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012); John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689 (2014); Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39 (Michael J. Lynch, E. Britt Patterson & Kristina K. Childs eds., Monsey NY: Criminal Justice Press 2008), <http://fairandimpartialpolicing.com/docs/pob7.pdf>.

246. Ruth Starkman, *Confessions of an Application Reader: Lifting the Veil on the Holistic Process at the University of California, Berkeley*, N.Y. TIMES, Aug. 1, 2013 (“After the next training session, when I asked about an Asian student who I thought was a 2 but had only received a 3, the officer noted: ‘Oh, you’ll get a lot of them.’”).

246. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

there is a very real concern that any race-based policy would be able to “remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”²⁴⁷ Even those who view negative action as separate from affirmative action cannot dispute the potential for admissions officers to view Asian Americans or perceive “Asian” qualities negatively.

During a debate at Harvard Law School on affirmative action, a student asked panelist Professor Randall Kennedy whether he believed affirmative action might hurt Asian Americans.²⁴⁸ After Kennedy conceded that certain subgroups such as Chinese and Japanese Americans might in fact be harmed by affirmative action, the moderator asked Kennedy if he “cared” about such results.²⁴⁹ In response, Kennedy analogized affirmative action to any social program requiring contributions from members of society who may not necessarily directly benefit.²⁵⁰ According to Kennedy, Asian Americans could and should, therefore, be required to contribute to the “social mission to overcome racial injustice in America.”²⁵¹ Yet as Kennedy himself asserted, choices to pursue such “missions” and the disadvantages they impose on certain groups are political decisions.²⁵² While society can decide to burden Asian Americans to carry out the goals of affirmative action, the choice to do so should not be considered legitimate when Asian Americans are left out of the discussion altogether. Unfortunately, to this point, there has not been an honest and full account of race-based affirmative action’s impact on Asian Americans. To repeat an earlier analogy, Asian Americans are being taxed without representation. Continuing to skew the issue not only fails to address the real concerns of groups and individuals, but also alienates those “on the fence” on affirmative action. After all, “[b]eing a good citizen, being an activist involves hearing the other side.”²⁵³ Whether we as a society continue to support race-based affirmative action or not, we should “care” enough to examine its true impact on Asian Americans. Simply put, affirmative action needs a “holistic” review.

247. *Bollinger*, 539 U.S. at 337.

248. Intelligence U.S. Debates, *Affirmative Action on Campus Does More Harm Than Good*, FORA.TV (Feb. 27, 2014), http://fora.tv/2014/02/27/Affirmative_Action_on_Campus_Does_More_Harm_Than_Good.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Obama’s ABC News Interview Transcript on Missouri Protestors*, FIRE (Nov. 15, 2015), <https://www.thefire.org/obamas-abc-news-interview-transcript-on-missouri-protesters/>.